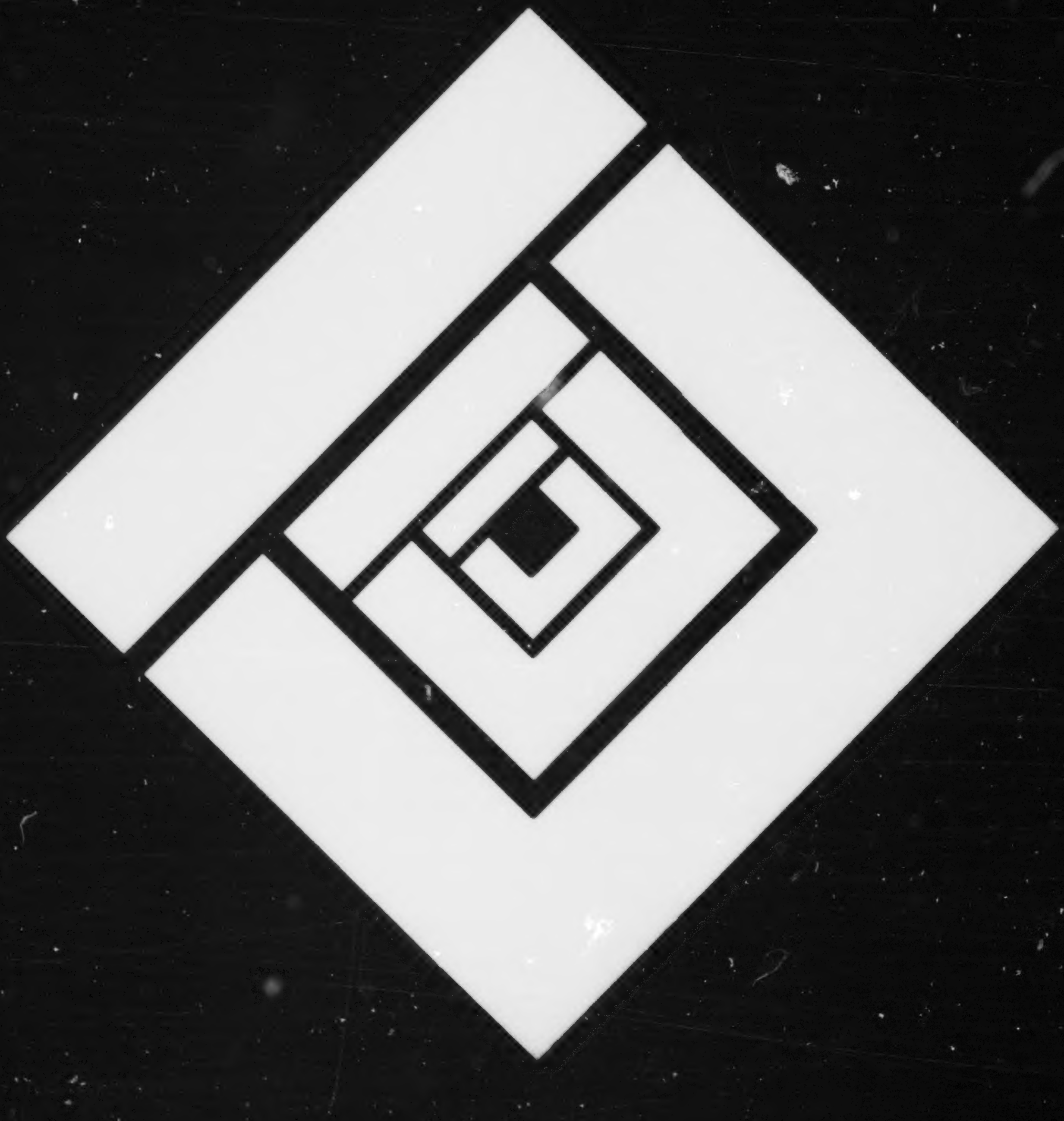
Annual Report
1983-84



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ONTARIO
LABOUR RELATIONS BOARD

ANNUAL REPORT
1983-84

TABLE OF CONTENTS

Letter of Transmittal

I Introduction 1

II A History of The Act 2

III Board Organization 6

IV The Board 7

V Highlights of Board Decisions 25

VI Court Activity 101

VII Case Load 107

VIII Board Publications 115

IX Staff and Budget 116

X Statistical Tables 117

Ontario
Labour Relations
Board

Office
of the
Chairman

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The Honourable Russell H. Ramsay
Minister of Labour
400 University Avenue
Toronto, Ontario
M7A 1T7

Dear Mr. Ramsay:

It is my pleasure to provide to you the fourth Annual Report of the Ontario Labour Relations Board for the period commencing April 1, 1983 to March 31, 1984.

Respectfully submitted,

George W. Adams, Q.C.
Chairman

GWA:cfj

I INTRODUCTION

This is the fourth issue of the Ontario Labour Relations Board Annual Report, which commenced publication in 1980-1981. This issue covers the fiscal year April 1, 1983 to March 31, 1984.

The report contains up to date information on the organizational structure and administrative developments of interest to the public and notes changes in personnel of the Board. As in previous years, this issue provides a statistical summary and analysis of the work-load carried by the Board during the fiscal year under review. Detailed statistical tables are provided on several aspects of the Board's function.

This report contains a section highlighting key decisions of the Board issued during the year. A brief description of every Board matter that was subject to review by the courts during the year is provided. Since many of these court decisions are unreported, the summaries in the Board's Annual Report have been well received, particularly by the practising bar. The report continues to provide a legislative history of the *Labour Relations Act* and notes the amendments to the Act that were passed during the fiscal year.

II A HISTORY OF THE ACT

In 1943, the Ontario Legislature engaged in one of the first attempts in Canada to institute an effective scheme of compulsory collective bargaining. *The Collective Bargaining Act, 1943*, S.O. 1943, c. 4 came about as a result of public hearing before a select committee of the Provincial Legislative Assembly. Although the establishment of a "Labour Court" was not strenuously lobbied for by any of the interest groups which made submissions to the Select Committee, it was this option which the Select Committee saw fit to endorse. The Committee's report, in the form of a draft bill, was submitted to the Legislature on March 25th, 1943, and when enacted on April 14th, 1943, legitimized collective bargaining in Ontario under the Ontario Labour Court, which was a division of the Supreme Court of Ontario.

The Act of 1943 abolished the common law doctrines of conspiracy and restraint of trade as they had applied to trade unions, and gave employees a right to participate in union activity. A union was permitted to apply for certification as the bargaining agent for a group of employees. The Court had power to ascertain the appropriate unit for the purpose of collective bargaining. It has been pointed out that:

> "... the shape and structure of the collective bargaining system was to be determined by a court which was expected to develop policies that would promote orderly collective bargaining. It was recognized that the scheme of the Act involved both administrative and judicial functions. The Court was also empowered to delegate its non-judicial responsibilities so that it could develop an administrative infra-structure to support its 'judicial' role." (MacDowell, R.O., "Law and Practice before the Ontario Labour Relations Board, (1978), 1 Advocate's Quarterly 198 at 200.)

The Act contained several features which are standard in labour relations legislation today – management dominated organizations could not be certified; managerial employees were excluded from the Act; employers could not discriminate against employees for participation in union activity; employers were required to recognize a certified bargaining agent; and there was a duty to bargain in good faith. The Labour Court had broad remedial powers – something which the Ontario Labour Relations Board would not have for many years. The Labour Court was the only forum for resolution of disputes arising under a collective agreement. This function was to be performed without cost to the parties. It is now performed by private boards of arbitration or sole arbitrators and, when the dispute arises in the construction industry, by the Labour Relations Board.

The Ontario Labour Court was to have a short lifespan (it opened in June 1943, and heard its last case in April, 1944). In his book, *The Ontario Labour Court 1943-44*, (Queen's University Industrial Relations Centre, Kingston, 1979), John A. Willes gives the following reasons for the Court's early demise:-

> "... the trade unions were complaining about the high cost of proceedings before the Court, the Judges were not eager to deal with labour matters under the Act, and most important, the Conservative party, that had promised to repeal the legislation if elected, formed the government in Ontario in the Spring of 1944."

The immediate circumstances which brought about the demise of the Labour Court (and hence the formation of a Board) was a wartime move by the Federal Government to centralize labour relations law. Owing to the division of powers between the Dominion and Provincial Governments, control over labour relations in Canada is shared between the two levels of government depending on whether the undertaking falls under Federal or Provincial jurisdiction. In 1907, the Federal Government attempted to bring labour disputes in public utilities and coal mines under Federal control by means of *The Industrial Disputes Investigation Act.* Dispute in other industries were often brought voluntarily within the provisions of the Act. In 1925 this Act was held by the Privy Council to be *ultra vires* the Dominion Parliament because it infringed on the Provincial power over "property and civil rights." *(Toronto Electric Commissioners v. Snider,* [1925] A.C. 396; [1925] 2 D.L.R. 5)

The Act was subsequently narrowed so as to encompass only those industries within Federal jurisdiction. This left labour relations largely in the hands of the Provincial legislatures, although by virtue of a clause in the Federal Act, Provinces could, in effect, "opt in" to the Federal system (all the Provinces except Prince Edward Island exercised this option for a time). However, given the constitutional situation in Canada, decentralization of labour policy was inevitable and the Ontario regime was representative of this decentralization. However, the fact that Canada was at war allowed the Federal Government to rely on its emergency power to pass Order in Council P.C. 1003. This Order adopted the general principles of the American *Wagner Act,* and called for an independent regulatory authority. The Ontario Labour Court was replaced by the Ontario Labour Relations Board, pursuant to *The Labour Relations Board Act, 1944,* S.O. 1944, c. 29, which was subject to the federal Wartime Labour Relations Board. The Chairman of the fledgling Ontario Board was Jacob Finkleman, who had been the registrar of the Labour Court.

In 1947, the Ontario Labour Relations Board became independent of the Federal Government by virtue of *The Labour Relations Board Act, 1947,* S.O. 1947, c. 54. The next year, *The Labour Relations Act, 1948,* S.O. 1948, c. 51, was passed. The 1948 Act, which was enacted in anticipation of new Federal legislation, repealed the earlier *Labour Relations Board* Acts and empowered the Lieutenant-Governor in Council to make regulations "in the same form and to the same effect as that ... Act which may be passed by the Parliament of Canada at the session currently in progress ..." This Act was basically transitional in nature, since work was already under way on the drafting of separate Provincial legislation, which made its first appearance in *The Labour Relations Act, 1950,* S.O. 1950, c. 34.

The major function of the Board was, and still remains, certifying trade unions as bargaining agents. The history of the Board is largely a history of the acquisition of new powers and functions, as new ways of dealing with the problems inherent in industrial relations developed. Initially, however, the Board's role was fairly limited. There was no enforcement mechanism at the Board's disposal in 1950. The major enforcement method was prosecution, in which case the Board had to grant consent to prosecute. The Board had the power to declare a strike or lockout unlawful, but this in itself fell short of being a very complete remedy. In a situation where an individual had been refused employment, discharged, discriminated against, threatened, coerced, or otherwise dealt with contrary to the Act, the appropriate remedy lay in an inquiry by a conciliation officer who then reported to the Minister who in turn could make an appropriate order.

Thus, outside of granting certifications and decertifications, the Board's power was quite limited. The power to make certain declarations, determinations, or to grant consent to prosecute under the Act was remedial only in a limited way. Of some significance during the fifties was the Board's acquisition of the power to grant a trade union "successor" status. *(The Labour Relations*

Amendment Act, 1956, S.O. 1956, c. 35). In 1962, the complementary section providing for the preservation of bargaining rights in the case of "successor employers" was passed and was later expanded so as to preserve existing collective agreements. *(The Labour Relations Amendment Act, 1961-62*, S.O. 1961-62, c. 48; *The Labour Relations Amendment Act, 1970*, S.O. 1970, c. 85.)

The Labour Relations Amendment Act, 1960, S.O. 1960, c. 54, made a number of changes in the Board's role. Most importantly, the Board received the authority to order reinstatement with or without compensation. In conjunction with this new power was the power to designate a field officer to investigate complaints. The Board's reinstatement and compensation orders could be filed in the Supreme Court of Ontario and were enforceable as orders of that Court. The Board also received the power to refer jurisdictional disputes to a new jurisdictional disputes commission which had the power to make interim orders or directions. The Board was given limited power to review the directions. As with the Board's reinstatement and compensation orders, the interim orders could be filed with the Supreme Court and thus become enforceable as orders of that Court. The Board also received the power to set a terminal date for the filing of membership evidence and evidence opposing certification, and the discretion to refuse to "carve out" a craft unit where there was a history of industrial organization in a plant. In 1960 provision was also made for pre-hearing representation votes.

In 1962, *The Labour Relations Amendment Act, 1961-62*, added new provisions to the Act in order to respond to unique problems which were evident in the construction industry. This industry was given a separate but somewhat similar regime under the Act in response to recommendations made in the "Goldenberg Report" *(Report of The Royal Commission on Labour Management Relations in the Construction Industry,"* March, 1962). Provision was made for determination of bargaining units by reference to geographic areas rather than particular projects. The Board, in consultation with interested parties, divided the province geographically for the purpose of certification in the construction industry. Labour policy with regard to the construction industry has continued to evolve. Legislation was introduced in 1977 to provide for province-wide bargaining in the industrial, commercial, and institutional sector of that industry in response to the recommendations contained in the "Franks Report" (*"Report of the Industrial Inquiry Commission into Bargaining Patterns in the Construction Industry in Ontario,"* May, 1976). (*The Labour Relations Amendment Act, 1977*, S.O. 1977, c. 31). Further amendments were made to the Act in relation to the construction industry in 1979 and 1980. *The Labour Relations Amendment Act, 1979 (No. 2)*, S.O. 1979, c. 113, and *The Labour Relations Amendment Act, 1980*, S.O. 1980, c. 31, extended the bargaining rights held by trade unions in the construction industry for any particular employer in relation to the industrial, commercial and institutional sector of the industry; prohibited selective strikes and lock-outs; and provided for an expeditious ratification procedure.

In 1970, by virtue of *The Labour Relations Amendment Act, 1970*, The Board received a significant extension to its remedial authority. Provision was made for authorization of a Labour Relations Officer to inquire into certain complaints with a view to settling the matters. The most interesting addition to the situations in which the Board could make remedial orders was in the case of a breach of the newly created "duty of fair representation." This duty, imposed on trade unions, required them not to act in a manner which was arbitrary, discriminatory, or in bad faith in their representation of employees for whom they hold bargaining rights. More recently, this duty has been extended to cover referral of persons to work. The Board also received the power to make "cease and desist" orders with respect to unlawful strikes and lock-outs in the construction industry, which would be filed with the Supreme Court and be enforceable as orders of the Court.

A major increase in the Board's remedial powers under the *Labour Relations Act* occurred in 1975. (*The Labour Relations Amendment Act, 1975*, S.O. 1975, c. 76). The Board was permitted to authorize a Labour Relations Officer to inquire into any complaint alleging a violation of the *Labour Relations Act*. A settlement reached by the parties and put into writing was binding on the parties, and a breach of such settlement could be dealt with in the same fashion as a breach of a provision of the Act. The Board's remedial powers were extended to all violations of the Act, and orders of the Board were enforceable in the same way that an order of the Supreme Court is enforceable. The Board also received authority to make "cease and desist" orders with respect to any unlawful strike or lock-out. It was in 1975 as well, that the Board's jurisdiction was enlarged to enable it to determine grievances in the construction industry referred to it by one of the parties to a collective agreement.

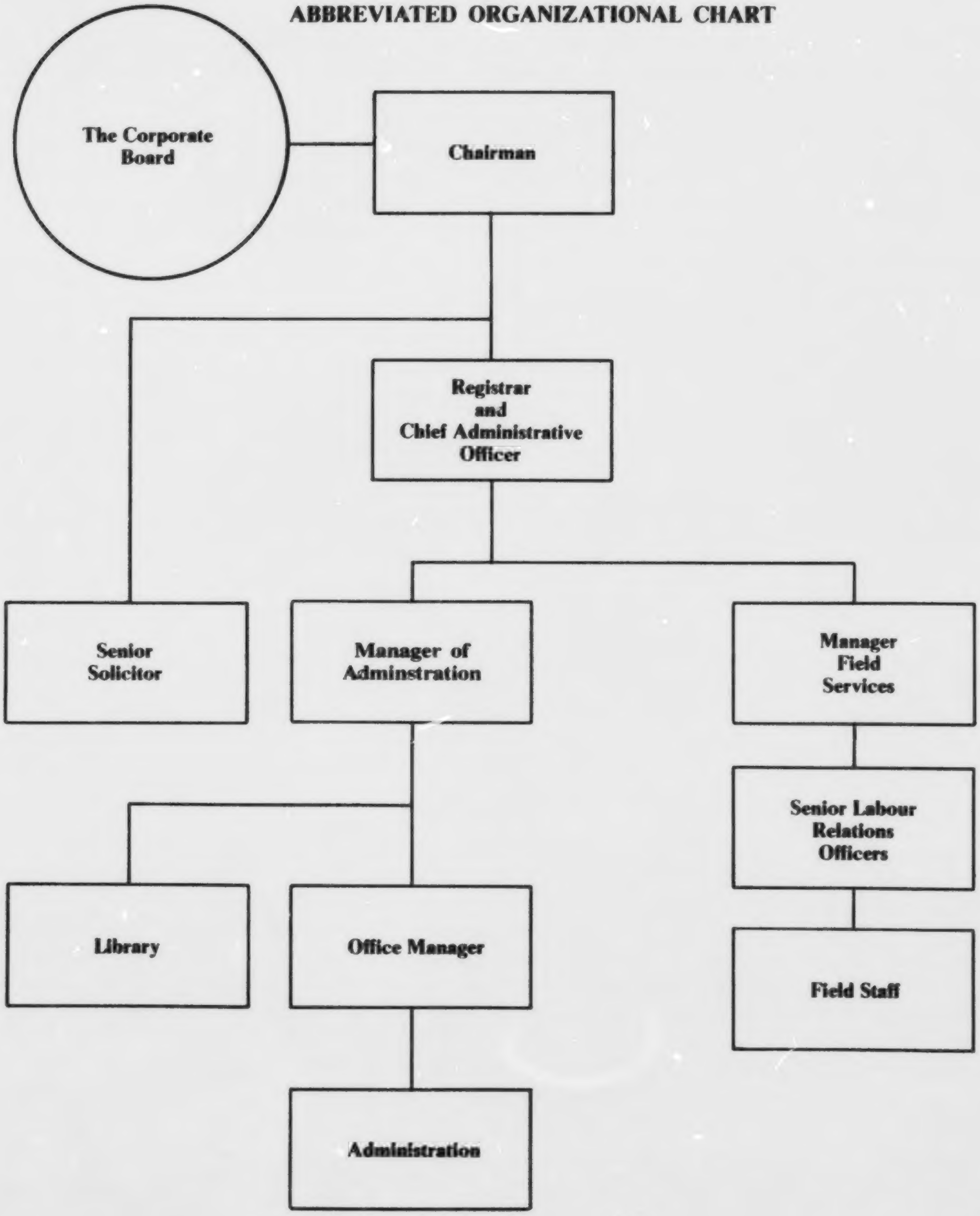
In June of 1980, *The Labour Relations Amendment Act, 1980 (No. 2)*, S.O. 1980, c. 34, was passed providing for compulsory check-off of union dues and the entitlement of all employees in a bargaining unit to participate in ratification and strike votes. Provision was also made for the Minister of Labour to direct a vote of the employees in a bargaining unit on their employer's final offer at the request of their employer.

During the year under review, the *Labour Relations Amendment Act 1983*, S.O. 1983, c. 42 was enacted. This Act, which received Royal Assent on June 21, 1983, inserted section 71a into the Act, prohibiting strike related misconduct and the engaging of or acting as, a professional strike-breaker.

III BOARD ORGANIZATION

The following is an abbreviated organizational chart of the Ontario Labour Relations Board:

ABBREVIATED ORGANIZATIONAL CHART


The Corporate Board
Chairman
Registrar and Chief Administrative Officer
Senior Solicitor
Manager of Adminstration
Manager Field Services
Senior Labour Relations Officers
Library
Office Manager
Field Staff
Administration

IV THE BOARD

The legislative policy regarding labour relations in the Province of Ontario is set out in the preamble to the *Labour Relations Act* as follows:

> "... it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees."

With this policy as a basis, the Act confers on the Ontario Labour Relations Board the authority over many important aspects of collective bargaining such as certification of trade unions, unfair labour practices, unlawful strikes and lock-outs, jurisdictional disputes, and arbitration of grievances in the construction industry. In order to carry out this mandate the Board is composed of a Chairman and an Alternate Chairman, several Vice-Chairmen and a number of Members representative of labour and management respectively in equal numbers. These appointments are made by the Lieutenant-Governor in Council.

Created by statute, the Ontario Relations Board is best described as a quasi-judicial body, combining as it does, administrative and judicial functions. The Board attempts to avoid being overly technical or legalistic in making its determinations and relies heavily on the efforts of its Labour Relations Officers in encouraging settlements without the need for formal hearings. The Board strives to keep its procedures informal, expeditious and fair.

The Board, under section 106(1) of the *Labour Relations Act*, R.S.O. 1980, c. 228, has the exclusive jurisdiction to exercise the powers conferred upon it by or under the Act and to determine all questions of fact or law that arise during any hearing before it. The Board's decisions are not subject to appeal and a privative clause in the statute limits the scope for judicial review. However, the Board has the power to reconsider any of its decisions, either on its own initiative or at the request of an affected party.

The Board has the power to determine its own practices and procedures. The publication entitled *Rules of Procedure, Regulations and Practice Notes* (Queen's Printer, Ontario) contains the established regulations, procedures and practices of the Board. New Practice Notes are published by the Board in its Monthly Report from time to time.

The Ontario Labour Relations Board has a somewhat limited role to play with respect to much of the collective bargaining viewed as falling within the public sector. For example, the Board does not have jurisdiction over crown employees, policemen or firemen, and has only a limited jurisdiction with respect to teachers in the schools and community colleges in the province. See the *School Boards and Teachers Collective Negotiations Act*, R.S.O. 1980, c. 464 and the *Colleges Collective Bargaining Act*, R.S.O. 1980, c. 464. On the other hand, the Board has full jurisdiction over employees employed by municipalities and hospitals. The Board is also given an important role under the *Occupational Health and Safety Act*, R.S.O. 1980, c. 321. During the year under review the Board was required on several occasions to determine the impact of the *Canadian Charter of Rights and Freedoms* and the *Inflation Restraint Act* on the rights of parties under the *Labour Relations Act* and the *Hospital Labour Disputes Arbitration Act*.

Apart from its adjudicative function, the Board's operations may be broadly divided into the following areas: (a) Administrative Division, (b) Field Services and (c) Office of the Solicitor.

(a) ADMINISTRATIVE DIVISION

The Registrar and Chief Administrative Officer is the senior administrative official of the Board. He is responsible for supervising the day-to-day administrative and field operations of the Board. Every application received by the Board enters the system through the Registrar's office. He determines the hearing dates, assures the effective and speedy processing of each case and communicates with the parties in all matters relating to the scheduling of hearings, the holding of votes or particular problems in the processing of any given case.

The Ontario Labour Relations Board is faced with a substantially increasing caseload, constraints on its access to public funds, and the continuing demands of the parties appearing before it for quick justice. Faced with these conflicting pressures, the ability of the Board to efficiently manage its caseload within the resources allocated to it, underpins much of its contribution to labour relations harmony in this province.

The Manager of Administration and the Manager of Field Services report directly to the Registrar and Chief Administrative Officer. The former manages the day-to-day administrative operation and the latter the field services. An Administrative Committee comprised of the Chairman, Alternate Chairman, Registrar and Chief Administrative Officer, Manager of Administration, Manager Field Services, Senior Solicitor and Officer Manager meets regularly to discuss all aspects of Board administration and management.

The administrative division of the Board includes: office management, case monitoring, and library services.

1. Office Management

An administrative support staff of approximately 60 people, headed by an Office Manager who reports to the Manager of Administration, and a Senior Clerical Supervisor processes all the applications received by the Board.

Four primary sections deal with applications:

(l) The certification section handles all applications for certification, termination and accreditation.

(2) The sundry section processes all other applications including unfair labour practice complaints, grievances in the construction industry and illegal strike and lock-out proceedings.

(3) The vote section deals with all representation votes.

(4) The clerks section reviews evidence in support of, or opposition to, trade unions filed with the Board in certification and termination applications and

prepares the material necessary for the Board to conduct hearings and when necessary, attends hearings to assist the Board.

The bulk of the Board's caseload is made up of applications for certification, unfair labour practice complaints and referrals to arbitration of construction industry grievances.

The Registrar's office is responsible for setting hearing dates for all cases and maintaining an up-to-date availability roster of all Vice-Chairmen and Board Members for scheduling purposes.

2. Case Monitoring

A computerized case monitoring system was introduced during 1982-83. Data on each case is coded on a day-to-day basis as the status changes. Reports are then issued on a weekly and monthly basis on the progress of each proceeding from the filing of applications or complaints to their final disposition.

By monitoring cases on a day-to-day basis, the Board is able to pinpoint problems and delays and address them quickly. The monitoring system and its reports provide statistical information to senior management that is used as a basis for recommendations regarding improvements or changes in Board practices and procedures which can lead to increased productivity and better service to the community.

3. Library Services

The Ontario Labour Relations Board Library employs a staff of 3, including a full time professional librarian. The Library Staff provides research services for the Board and assists other library users.

The Board Library maintains a collection of approximately 1000 texts, 100 journals and 25 case reports in the areas of industrial relations, labour, contract, evidence, constitutional and administrative law. The library has approxiately 4000 volumes. The collection includes decisions from other jurisdictions, such as the Canada Labour Relations Board, the U.S. National Labour Relations Board and provincial labour boards from across Canada.

The Library Staff maintains a computer index to the Board's Monthly Report of decisions. It provides access by subject, party names, file number, Statutes considered, cases cited, date etc. The system also provides a microfiche index to the decisions. It permits Board members and staff prompt and accurate access to previous Board decisions dealing with particular issues under consideration. The Board is the first labour relations tribunal in Canada to develop and implement this type of system. It has been reviewed by officials from a number of labour relations boards and may be used as a model in the development of other computerized retrieval systems.

Several changes have taken place in the library. A new Board Librarian, Clare Lyons, was appointed effective November 1, 1983. The Library has also expanded and now occupies approximately 1300 square feet.

(b) FIELD SERVICES

In view of the Board's firm belief that the interests of the parties appearing before it, and labour relations generally in the province, are best served by settlement of disputes by the parties without a need for a formal hearing and adjudication, increasing emphasis is placed on the role of the field officers in assisting parties to resolve their disputes. In order to respond to a caseload, which is increasing in both volume and complexity, the Board's field services division was re-organized in the fiscal year 1982-83. Under this structure, the Manager of Field Services, is responsible for the overall functioning of the division with particular emphasis upon the setting and monitoring of performance standards, case assignments, staff development and maintaining liaison with the Board. The Manager of Field Services is assisted by three Senior Labour Relations Officers, each of whom is assigned a team of officers. The Senior Labour Relations Officers, in addition to handling their usual caseload in the field, are responsible for providing guidance and advice in the handling of individual cases, managing the Board's certification day settlement efforts on a rotating basis, and assisting with the performance appraisals of the Board's labour relations officers.

The field staff, during the year under review, consisted of the Manager, three Senior Labour Relations Officers, seventeen Labour Relations Officers and two Returning/Waiver Officers. The Board's Returning/Waiver Officers conduct representation votes directed in Board proceedings and carry out the Board's waiver program in relation to certification applications. In addition, these officers undertake the conduct of final offer votes directed by the Minister of Labour. In fiscal year 1983-84, under the new structure, the field staff continued its excellent performance. The settlement rate for the year was approximately 85 percent in all matters. With this performance, the field services division made a significant contribution towards the Board's excellent overall performance in fiscal year 1983-84.

The Alternate Chairman of the Board supervises field activities, and, along with the Manager, Field Services and the Board Solicitors, meets with the officers on a monthly basis to review recent developments in Board jurisprudence affecting officer activity and the performance of the field services program.

(c) OFFICE OF THE SOLICITOR

The Office of the Solicitor, under the direction of the Senior Solicitor of the Board, reports directly to the Chairman. A solicitor assists the Senior Solicitor in carrying out the functions of this office. In addition, each year the Board employs several articling law students to assist in the solicitor's work.

The Office of the Solicitor is responsible for providing the legal assistance required by the Board in all facets of its operations. The solicitors engage in legal research and provide legal advice to the Chairman, Vice-Chairman and Board Members in their day-to-day functions. They provide legal opinions to the Board and prepare memoranda relating to the wide variety of legal issues that arise during Board proceedings. The Office of the Solicitor is responsible for preparing all of the Board's legal forms and other legal documents required for use by the Board. Board procedures, practices and policies are constantly reviewed by the Office of the Solicitor. When preparation or revision of practice notes, Board Rules or forms become necessary, the Office of the Solicitor is responsible for undertaking those tasks.

The Senior Solicitor is active in the staff development programme of the Board and the solicitors regularly meet with the Board's field staff to keep them advised of legislative, Board and judicial developments that may affect their day-to-day work. The solicitors are available for consultation by these officers on legal issues that may arise in the course of their work. At regularly scheduled field staff meetings, the solicitors prepare written material for distribution and discussion among the field staff relating to recent decisions of the Board or other tribunals which may affect the discharge of their duties. The Senior Solicitor also advises the Board Librarian on the legal research material requirements of the Board and on the library's general acquisition policy.

Another function of the Office of the Solicitor is the representation of the Board's interest in court, when matters involving Board proceedings or Board orders become the subject of proceedings in court, as when an application for judicial review of a Board order is filed or an application is made by way of stated case to the Divisional Court. Where outside counsel is retained to represent the Board, the Senior Solicitor in consultation with the Chairman, briefs and instructs such counsel on the Board's position in relation to the issues raised by the judicial proceedings. The Office of the Solicitor is also responsible for the preparation and compilation of documents that the Board may be required to file with the court in relation to such proceedings.

During the year under review, the Courts dealt with sixteen applications for judicial review. Of these all but one were dismissed. In the application that was granted leave to appeal was granted and a decision from the Court of Appeal is pending, the hearing having been completed. In another case in which an application for judicial review was successful during the last fiscal year, leave to appeal was obtained and on appeal the Court of Appeal reversed the decision of the Divisional Court. Of three applications for leave to appeal to the Court of Appeal made during the fiscal year, two were granted and one dismissed. In one case, an application for prohibition under section 6(2) of the *Judicial Review Procedure Act* was refused and in another a motion for a direction that the Board produce a copy of a draft decision for inclusion in the record in a matter of which was the subject of an application for judicial review, was dismissed.

During the fiscal year four applications to stay Board proceedings were made and all four applications were dismissed.

The Office of the Solicitor maintains an information service through which any person may obtain, by telephone, general information relating to the *Labour Relations Act*, the Regulations, procedures and practices of the Board, and other related legislation. It is also possible for a member of the public to obtain such information at a personal interview with a member of the Board's legal staff. The solicitors also receive and respond to written inquiries coming from the public. In addition to the two pamphlets entitled "Certification by the Ontario Labour Relations Board" and "Rights of Employees, Employers and Trade Unions", the Board recently issued a pamphlet entitled "Unfair Labour Practice Proceedings before the Ontario Labour Relations Board." In September of 1982, the Board commenced a publication entitled "Monthly Highlights". This publication contains summaries of significant decisions of the Board during the month and other notices and administrative developments of interest to the labour relations community. The Board strives to issue the Monthly Highlights as quickly as possible after the end of each month and already it has been well received by the community. The Board recently revised the Construction Industry Map of Ontario, depicting the geographic areas used by the Board in construction industry certification cases. The Office of the Solicitor is responsible for producing the Board's Annual Report and for periodically revising the publication entitled "A Guide to the Labour Relations Act", which is an explanation in layman's terms of the significant provisions of the Act. As part of the information providing function, from time to time the Board's solicitors accept invitations from employer trade union or employee groups or from groups of students to speak on Board practice and procedure.

Nine formal complaints relating to the Board were disposed of by the Ombudsman. In four of these, after conducting an investigation, the complaints were found by the Ombudsman to be unsupportable. In three complaints, the files were closed, the Board being notified that the Board's explanation in response to the complaint was satisfactory and one complaint was withdrawn by the complainant. In one case the complaint was found to be supportable. However, the Ombudsman did not make any recommendations in view of the fact that the Board had granted the complainant leave to re-open his hearing before the Board.

The Office of the Solicitor is also responsible for the publication of the Ontario Labour Relations Board Report, a monthly series of selected Board decisions which commenced in 1944. The Solicitor is Editor of this publication, which is one of the oldest and most prestigious labour board reports in North America. The Board has computerized its subscription list to ensure maximum efficiency in dealing with the subscribers to the Report and uses its existing word processing equipment to provide the typesetter of the Monthly Report with machine readable manuscript, thus reducing both the cost and time of its publication.

MEMBERS OF THE BOARD

In the year under review, the Board consisted of the following persons:

GEORGE W. ADAMS, Q.C. *Chairman*

Appointed Chairman of the Ontario Labour Relations Board effective September 1, 1979, Mr. Adams holds degrees of B.A. (McM) 1967, LL.B. (Osgoode, with honours) 1970, and LL.M. (Harvard 1971). His professional background includes: law professor at Osgoode Hall Law School, 1971-78; Vice-Chairman Ontario Labour Relations Board, 1974-75; Assistant Deputy Minister of Labour, Province of Ontario, 1975-77; Vice-Chairman, Ontario Education Relations Commission, 1977-79; Chairman, Ontario Grievance Settlement Board 1977-79; and private practitioner with a Toronto law firm, 1978-79. Mr. Adams is the author of numerous books, monographs and articles, the majority of them relating to labour law. He is an experienced arbitrator, mediator and fact-finder. He is a member of the National Academy of Arbitrators and the Law Society of Upper Canada.

KEVIN M. BURKETT *Alternate Chairman*

Mr. Burkett has served as the Board's Alternate Chairman since September of 1979. He was first appointed as a Vice-Chairman of the Board in November of 1975. Mr. Burkett, who holds B.A. and M.B.A. degrees from the University of Toronto, has had much varied experience in industry, trade unions and government prior to joining the Board. Having served as the Research Director/Negotiator of the Civil Service Association of Ontario (predecessor of the Ontario Public Service Employees Union), from 1968 to 1970, he joined the Ontario Ministry of Labour in 1970 as a conciliation officer and was appointed as a mediator in 1972. In 1973 he joined Ontario Hydro as Senior Industrial Labour Relations Officer, a post he held until his appointment to the Board. Mr. Burkett is an experienced arbitrator, mediator and fact-finder, both in the private and public sectors. Mr. Burkett served as the Chairman of the Joint Federal-Provincial Inquiry Commission into Safety in Mines and Mining Plants in Ontario, whose report was submitted to the respective Ministers of Labour in May 1981.

GAIL G. BRENT *Vice-Chairman*

A part-time Vice-Chairman since 1977, Mrs. Brent graduated in 1965 with a B.A. from the University of Toronto and with a LL.B. from Queen's University in 1968; she was called to the Bar in 1975. Mrs. Brent taught law at Queen's University from 1970 to 1974, and at the University of Western Ontario from 1974 to 1977. She was appointed to the permanent list of approved arbitrators of the Labour-Management Arbitration Commission in 1974, and since 1977 has been an active arbitrator and adjudicator. She has been an arbitrator with the Ontario Police Arbitration Commission since 1974. In 1980 Mrs. Brent was appointed as a Commissioner of both the Education Relations Commission and the Colleges Relations Commission.

R.M. (RICK) BROWN *Vice-Chairman*

Rick Brown came to the Board in 1983 from the Faculty of Law at the University of Victoria where he had taught since 1977 after completing graduate work at Harvard University. He is a part-time member of the Public Service Staff Relations Board and a sometime arbitrator. On the academic front, he has published several articles on labour relations law, is a co-editor of a case book on Canadian employment law and is the labour law editor of the Supreme Court Law Review.

E. NORRIS DAVIS *Vice-Chairman*

Mr. Davis, who holds the degree of LL.B. (Sask.) 1938, was first appointed to the Board as an employer representative in 1948. From 1952 to 1953 he served as the Chairman of the Board. In 1953 Mr. Davis left the Board and during the next 15 years had several positions in corporate personnel and industrial relations, including a number of years as President of Carling O'Keefe Breweries of Canada Limited. Mr. Davis returned to the Board as a part-time Vice-Chairman in 1977 and served in that capacity until his recent retirement.

RORY F. EGAN *Vice-Chairman*

Mr. Egan completed his undergraduate work at St. Michael's College, University of Toronto in 1938. After the intervening world war, Mr. Egan earned a law degree from the same university in 1945. Called to the Bar in the same year, he engaged in the practice of law, and served for one year as Assistant Crown Attorney in St. Thomas, Ontario. In 1954 he joined A.V. Roe as Legal Assistant to the Vice-President of Industrial Relations. Mr. Egan returned to private practice with a law firm specializing in labour relations law in 1959. In 1963 he left his law practice to devote his time to chairing boards of conciliation and arbitration. Mr. Egan was appointed a Vice-Chairman to the Ontario Labour Relations Board in 1966 and in 1974 was designated Alternate Chairman. He was appointed Chairman of the Ontario Police Arbitration Commission in 1976. Mr. Egan retired from his full time position at the Board in 1979 but continued to serve as a part-time vice-chairman until his recent retirement.

D.E. (DON) FRANKS *Vice-Chairman*

Mr. Franks is a graduate of McMaster University (B.A. 1960) and Osgoode Hall Law School (LL.B. 1967). Joining the Board in 1969, he served as its Solicitor. In 1972 Mr. Franks was appointed a Vice-Chairman of the Board. He occupied this position until 1975 when he was appointed Vice-Chairman of the Construction Industry Review Panel, which position he held until May, 1980. Mr. Franks also served, during 1975-76, as the Commissioner on the Industrial Inquiry Commission into Bargaining Patterns in the Construction Industry in Ontario. The report prepared by him led to the amendment of *The Labour Relations Act* in 1977 which provided for province-wide bargaining in the construction industry. Mr. Franks was also involved in the implementation and monitoring of the province-wide bargaining scheme. In 1978 he was appointed chairman of a conciliation board by the government of Saskatchewan, which resolved a two-month province-wide strike by the Labourers' Union. Mr. Franks returned to the Labour Relations Board as a Vice-Chairman in May of 1980. He is presently an Adjunct Associate Professor in the Faculty of Engineering of the University of Waterloo, where he lectures in construction industry labour relations.

R.A. (RON) FURNESS *Vice-Chairman*

Mr. Furness graduated from Imperial College, University of London, with a degree of B.Sc. in Mining Geology in 1957 and worked as a geologist in Newfoundland, Quebec, Ontario and Manitoba until 1960. He obtained his LL.B. degree from Osgoode Hall Law School in 1961, was called to the Bar in 1963 and received his LL.M. from York University in 1968. Mr. Furness first joined the Labour Relations Board as its Solicitor in 1963. He was appointed a Vice-Chairman in 1969.

OWEN V. GRAY *Vice-Chairman*

Mr. Gray joined the Board as a Vice-Chairman in October, 1983. He is a graduate of Queen's University, Kingston, (B.Sc. Hons, 1971) and the University of Toronto, (LL.B. 1974). After his call to the Ontario Bar in 1976, Mr. Gray practised law with a Toronto law firm until his appointment to the Board.

ROBERT D. HOWE *Vice-Chairman*

Mr. Howe was appointed to the Board as a part-time Vice-Chairman in February, 1980 and became a full-time Vice-Chairman effective June 1, 1981. He graduated with a LL.B. (gold-medallist) from the Faculty of Law, University of Windsor in 1972 and was called to the Bar in 1974. From 1972 to 1977 he was a law professor at the Faculty of Law, University of Windsor. From 1977 until his appointment to the Board, he practised law as an associate of a Windsor law firm while continuing to teach on a part-time basis at the Faculty of Law as a special lecturer in labour law and labour arbitration. Mr. Howe is an experienced arbitrator, referee, fact-finder and mediator.

RICHARD (RICK) MacDOWELL *Vice-Chairman*

Mr. MacDowell's educational background includes a B.A. (Honours) in Economics from the University of Toronto (1969), a M.Sc. (with Distinction) in Economics from the London School of Economics & Political Science (1970) and a LL.B. from the University of Toronto Law School (1974). He has been associated with the University of Toronto as a lecturer in industrial relations with the Department of Political Economy since 1971 and with the Graduate School of Business since 1976. A former Senior Solicitor of the Board, Mr. MacDowell was appointed to his present position of Vice-Chairman in 1979. He is an experienced arbitrator and has served as a fact-finder in school board-teacher negotiations. Mr. MacDowell also has several publications relating to labour relations to his credit.

MORT. G. MITCHNICK *Vice-Chairman*

Mr. Mitchnick was appointed as Vice-Chairman of the Board in November, 1979. A native of Hamilton, Ontario, Mr. Mitchnick graduated with a B.A. from McMaster University in 1967 and completed his LL.B. at the University of Toronto Law School in 1970. After his call to the Bar in 1972, he engaged in the practice of labour law with a Toronto law firm until his appointment to the Board.

CORINNE F. MURRAY *Vice-Chairman*

Mrs. Murray joined the Board as a Vice-Chairman in August 1982. Prior to her appointment, she practised labour law with a Toronto law firm for six years. During this period, Mrs. Murray had acted as lecturer on the subject of labour law for numerous management groups. Having graduated from Dalhousie Law School, Halifax, Nova Scotia, she was subsequently called to the Bar in British Columbia and Ontario.

MICHEL G. PICHER *Vice-Chairman*

Mr. Picher holds the degrees of A.B. (Colby College, Maine 1967), LL.B. (Queen's University, 1972) and LL.M. (Harvard, 1974). He was appointed a Vice-Chairman of the Board in 1976. Prior to his appointment. Mr. Picher taught law as Assistant Professor in the Faculty of Law at the University of Ottawa from 1974 to 1976. He is an experienced arbitrator, mediator and fact-finder. During the year under review, Mr. Picher left the Board and is presently engaged in full-time private practice as an arbitrator and mediator.

PAMELA C. PICHER *Vice-Chairman*

Mrs. Picher was appointed a Vice-Chairman of the Ontario Labour Relations Board in 1976. She is a graduate of Colby College, Maine (A.B., 1967) and Queen's University (LL.B., 1973). She is presently working towards a LL.M. degree from Harvard university, the required thesis having been completed. Prior to joining the Board, Mrs. Picher was an Assistant Professor at the University of Ottawa Law School. In 1975 she was commissioned by the Law Reform Commission of Canada to write a paper for the Administrative Law Section, which she presented in July, 1976. Mrs. Picher has several other legal publications to her credit and is an experienced arbitrator and fact-finder. In June of 1981, Mrs. Picher moved from full-time to part-time status.

NORMAN B. SATTERFIELD *Vice-Chairman*

Mr. Satterfield joined the Labour Relations Board in October, 1975, as a part-time Board Member representing management. In January of 1978 he was appointed a Vice-Chairman. Mr Satterfield holds a B. Comm. degree from the University of British Columbia (1949) and a diploma in Industrial Relations from Queen's University (1954). He has been involved in labour relations activities in the brewing, heavy manufacturing and construction industries for over 25 years. Mr. Satterfield is a past Director of the Construction Labour Relations Association of Ontario and a past Member of the National Relations Committee of the Canadian Manufacturers' Association.

IAN C.A. SPRINGATE *Vice-Chairman*

Mr. Springate has been a Vice-Chairman of the Board since May of 1976. He has degrees of B.A. with distinction, (Sir George Williams, 1968), M.B.A. (McMaster University, 1970) and LL.B. (Osgoode, 1973). Having served his period of articles with the Ontario Labour Relations Board, Mr. Springate was subsequently called to the Bar with honours and practised law with a Toronto firm that specialized in labour law until his appointment as a Vice-Chairman. Mr. Springate taught in the M.B.A. programme at McMaster University as a part-time lecturer in industrial relations from 1973 to 1978. He is an experienced arbitrator, and was recently appointed Chairman of the Crown Employees Grievance Settlement Board.

Members Representative of Labour and Management

BROMLEY L. ARMSTRONG

A well-known civil rights leader, Mr. Armstrong was appointed a full-time Member of the Board representing labour in March of 1980. He has held various positions in unions, including local union representative, union steward, plant committee representative and financial secretary. Mr. Armstrong has actively participated in the activities of numerous ethnic and cultural associations, as founding member in many of them. He has been an executive member of the Canadian Civil Liberties Association since 1972 and was a member of the Advisory Council on Multiculturalism in Ontario from 1973 to 1975. Mr. Armstrong was appointed a Commissioner of the Ontario Human Rights Commission in 1975, which post he held until his appointment to the Board. Mr. Armstrong was recently honoured by the Government of Jamaica when he was appointed a Member of the Order of Distinction in the rank of officer, in the 1983 Independence Day Civil Honours List.

CLIVE A. BALLENTINE

A full-time Member of the Board representing labour since 1979, Mr. Ballentine has been a member of the Bricklayers Union (Local 2) since 1947. During that time he has held various offices in Local 2, including President from 1958 to 1959. In 1964 Mr. Ballentine was elected the Business Agent of Local 2, and in 1968 became the Business Representative of the Toronto Building and Construction Trades Council. In 1974 he assumed the post of Manager and Financial Secretary of the Council and held that position until his appointment to the Board. Mr. Ballentine is also a past executive Member of the Labour Council of Metropolitan Toronto and was its Vice-President between 1975 and 1977. He has served on the Ontario Construction Industry Review Panel and the Ontario Premier's Advisory Committee for an Economic Future.

JOHN D. BELL

Mr. Bell has been a full-time Member of the Board representing management since 1970. He was employed for 33 years at Massey-Ferguson Limited in various personnel and industrial relations capacities prior to his appointment to the Board. The last position he held at the Company was Director of Personnel and Industrial Relations, Industrial and Construction Machinery Division. Mr. Bell retired as a full-time Board Member in August, 1982 and was subsequently re-appointed as part-time Board Member.

DONALD H. BLAIR

Mr. Blair was appointed as a part-time member of the Board representing management in March, 1983. Mr. Blair retired from Dominion stores after 31 years of service, the last 15 years as Director of Labour Relations. In May of 1983, Mr. Blair established a firm specializing in providing industrial relations consulting services. He has been a member of the Personnel Association of Toronto since 1960 and was a Director of the same during 1965-67. He was also Vice-Chairman of the Board of Directors of the Central Ontario Industrial Relations Institute from 1979 to 1983.

C. GORDON BOURNE

Mr. Bourne has been a part-time Member of the Board representing management since April of 1977. Between 1945 and 1977, he was employed by Molson's Brewery (in Quebec and in Ontario) in various personnel and industrial relations capacities. Among the offices Mr. Bourne held prior to his appointment to the Board include: Director of the Montreal Personnel Association (1952-54); Director (1962-67) and President (1966-67) of the Personnel Association of Toronto; Member of the Canadian Manufacturers' Association Ontario Labour Relations Committee (1963-77); and Member of the Ontario Brewers' Industrial Relations Committee (1955-77).

E. JIM BRADY

Mr. Brady was appointed a part-time Member of the Board representing management in November, 1979. He was employed in various capacities in personnel and industrial relations for 34 years prior to his appointment. He spent the majority of this time at Kimberley-Clark of Canada Limited, where he became Director of Industrial Relations in 1972. In 1975, Mr. Brady was appointed Vice-President of Industrial Relations of the Abitibi-Price Inc. Group.

FRANK C. BURNET

On December, 1983, Mr. Burnet was appointed a part-time Board Member representing management. After graduating from the University of Saskatchewan (B.A. Economics, 1940) Mr. Burnet was engaged in personnel capacities in several corporations in Ontario and Quebec. In 1970 he joined Inco Ltd., as its Director of Industrial Relations responsible for all Canadian Operations. From 1972 until his retirement in 1982, Mr. Burnet held the position of Vice-President Employee Relations, responsible for employee relations activities in Canada, U.S., U.K., and other foreign operations. The many offices Mr. Burnet has held include: Chairman, National Industrial Relations Committee of the Canadian Manufacturers' Association, 1978-81; Governor and Member of the Executive Committee of the Canadian Centre for Occupational Health and Safety, 1982-83; Member of OECD Joint Labour-Management team studying technological change in the U.S. (1963) and incomes policy in the U.K. and Sweden, (1965).

LEONARD C. COLLINS

Mr. Collins was appointed a part-time Member of the Board representing labour in November, 1982. Prior to joining the Board Mr. Collins had been very active in the trade union movement in Ontario. From 1945 to 1960 he held various positions with Local 232 of the United Rubber Workers, including the positions of Vice-President from 1950 to 1954 and President from 1954 to 1960. Since 1960 he has been an International Field Representative for the United Rubber Workers and since 1971 has from time to time served as acting Director of District 6. Mr. Collins is very experienced in labour board and arbitration board proceedings.

F. STEWART COOKE

In October, 1981, Mr. Cooke was appointed as a full-time Board Member representing labour. Having served in the Army in the early 1940's, Mr. Cooke studied Economics and Law at Victoria College for two years. Mr. Cooke's career with the United Steelworkers of America commenced in 1948 when he joined its staff. In 1949, he was elected secretary of the Hamilton Labour Council of the Canadian Congress of Labour. In 1953, Mr. Cooke was appointed Supervisor for the Hamilton area, a position he held until March, 1971. In 1956, he was elected Secretary of the merged Hamilton and District Labour Council of the Canadian Labour Congress. In 1962 Mr. Cooke was elected Vice-President of the Hamilton and District Labour Council. In March of 1971 Mr. Cooke was appointed District Representative of the Steelworkers District 6. Subsequently, Mr. Cooke held several key positions with the Steelworkers, including International Representative, before being elected Director of District 6 in 1977, a position he held until September, 1981. From 1972 to 1977 he was a Vice-President of the Ontario Federation of Labour. Mr. Cooke has served on the executive boards of numerous public, social and charitable organizations and has held several positions on the executive of the New Democratic Party of Canada including the position of Vice-President, from 1967 - 1980. He has represented the Canadian Labour movement at many conferences, including the Iron and Steel Committee of the International Labour Organization, in Switzerland, 1969, and the International Metalworkers Federation Iron and Steel Conference in Belgium, 1969. Mr. Cooke has also been on delegation to the U.S.S.R., Japan, Sweden, Norway, Finland, France, and Holland.

W. GORDON DONNELLY

Mr. Donnelly was appointed a part-time Board Member representing management in 1979. Having obtained a B.A. (1939) and B.C.L. (1947) from McGill University of Montreal, he practised law in the Province of Quebec. In 1947 he joined the Aluminum Company of Canada Limited, where he progressed from Industrial Relations Supervisor, Shawinigan Works, to Vice-President Personnel and Industrial Relations, Alcan Products Limited, Toronto, Ontario 1970.

MICHAEL EAYRS

Mr. Eayrs was appointed a part-time Board Member representing management in 1979. A graduate of the University of British Columbia. Mr Eayrs has had a long career in personnel and industrial relations with companies in British Columbia, Quebec and Ontario, and the West Indies. The positions he had held include: Director of Labour Relations of the Ontario Federation of Construction Associations, 1970; Executive Secretary of the Joint Labour-Management Construction Industry Review Panel, 1972; Director of Industrial Relations, Kaiser Canada, 1974; Manager of Industrial Relations of the SNC Group, 1975; and Executive Director of the Construction Employers Co-ordinating Council of Ontario, 1979. Mr. Eayrs is also a past Chairman of the National Labour Relations Committee of the Canadian Construction Association.

WILLIAM GIBSON

Mr. Gibson was appointed a part-time Board Member representing management in 1978. He has been employed by Robert McAlpine Limited since 1954 and is Vice President of that company with a portfolio that includes the responsibility for labour relations for the Company's operations throughout Canada. Mr. Gibson has been very active in the field of labour relations involving contractors and has held several key positions in various construction contractors' associations.

ANDREW GRANT

Mr. Grant was appointed a part-time Board Member representing management in April, 1983. After a period of employment at Gulf Canada, Mr. Grant joined B.P. Canada in 1960. At the time of his appointment to the Board, he was Manager, Lubricants Production. Mr. Grant has held offices in various committees including the National Board of Directors of the Packaging Association of Canada; Chairman, Industry Committee on Metric Conversion and Corporate Representative and Chairman of the Joint Canadian/U.S. Technical Committee of the Packaging Institute, U.S.A.

PAT V. GRASSO

Appointed a part-time member of the Board representing labour in December, 1982, Mr. Grasso has been active in the labour movement in Ontario for many years. Having held various offices in District 50 of the United Mine Workers of America, he was appointed Staff Representative in 1958, and Assistant to the Regional Director for Ontario in 1965. In 1969, Mr. Grasso became the Regional Director for Ontario and was elected to the International Executive Board. When District 50 merged with the United Steelworkers of America in 1972, he became Staff Representative of the Steelworkers in charge of organizing in the Toronto area. In January 1982, Mr. Grasso was transferred to the District 6 office of the Steelworkers and appointed District Representative in charge of co-ordinating, organizing and special projects.

ANNE S. GRIBBEN

Ms. Gribben, a registered nurse by profession, obtained a B.A from the University of Toronto in 1968, in addition to her nursing qualification. Her nursing career at the Toronto Western Hospital included 13 years served in a supervisory capacity. She has served on various committees of both the Canadian Nurses' Association and the Registered Nurses' Association since 1950. An Executive Officer of the former District No. 5, Registered Nurses' Association of Ontario from 1960, during 1964-65 she was involved in its re-organization into the present-day Metro Toronto Chapter. Ms. Gribben joined the Employment Relations Department of the Registered Nurses' Association of Ontario in 1965, and became its Director in 1968. Ms. Gribben relinquished that post in 1974 to become the Chief Executive Officer of the Ontario Nurses' Association. She was appointed a part-time Board Member representing labour in 1975 – the first woman to be appointed as a Board Member of the Ontario Labour Relations Board.

LLOYD HEMSWORTH

Mr. Hemsworth has served as a part-time Member of the Board representing management since August of 1975. Having obtained a B.A. degree (1939) from the University of Western Ontario, he returned to complete a management training course at that university in 1954. Mr. Hemsworth was also a part-time Member of the Public Service Staff Relations Board. Mr. Hemsworth held several key positions in the personnel and industrial relations departments at Canadian Industries Limited, Kimberley-Clark of Canada and de Havilland Aircraft. Mr. Hemsworth has presented lectures and papers at numerous universities and seminars. He has been an active participant in the Duke of Edinburgh Commonwealth Study Conferences held in 1956, 1962 and 1980 and served as Executive Director of the most recent conference.

ALBERT HERSHKOVITZ

Mr. Hershkovitz has served as a part-time Board Member representing labour since 1976. He has been the Business Agent of the Fur, Leather, Shoe and Allied Workers' Union, Locals 82 and 62, since 1956, and a Vice-President of the Ontario Federation of Labour since 1974. In 1977 he became the President of the Ontario Provincial Council, United Food & Commercial Workers' International Union. In addition to holding these offices, Mr. Hershkovitz has been a Member of the Board of Referees of the Unemployment Insurance Commission since 1960 and for many years has acted as a union nominee on boards of arbitration.

ROBERT D. JOYCE

Mr. Joyce has been a part-time Member of the Board representing management since September, 1977. He joined Canada Packers Limited in 1974 and became its Corporate Relations Manager in 1965. He was also elected to the Company's Board of Directors that year. During his career at Canada Packers, Mr. Joyce was actively involved in negotiation, conciliation and arbitration proceedings and also served on many boards of arbitrations as employer nominee. Mr. Joyce has been called upon to serve on commissions and task forces appointed by governments on several occasions. As a member of the Canadian Manufacturers Association Industrial Relations Committee, Mr. Joyce has conducted many industrial relations seminars. He has also provided an employee relations consultation service for management for several years.

JOSEPH KENNEDY

In May, 1983, Mr. Kennedy was appointed a part-time Board Member representing labour. He has been a member of Local 793 of the International Union of Operating Engineers for over 30 years and has held various offices in that Local. At present he holds the position of Business Manager of Local 793.

HANK KOBRYN

A member of the Iron Workers' Union since 1948, Mr. Kobryn was the President of Local 700 of that union from 1951 to 1953. Thereafter, for 16 years, Mr. Kobryn held the post of Business Agent of the Iron Workers' Local 700 in Windsor. Among the many other offices Mr. Kobryn has held are: Vice-President of the Provincial Building and Construction Trades Council of Ontario, 1958-62; Secretary Treasurer of the same council, 1962; Member of the Labour-Management Provincial Safety Committee; Member of the Labour-Management Arbitration Commission; Member of the Construction Industry Review Panel; and Member of the Advisory Council on Occupational Health and Safety. In December, 1980, Mr. Kobryn was appointed a full-time Board Member representing labour.

BRUCE K. LEE

Mr. Lee has served as a part-time Board Member representing labour for the past three years. He was President of the UAW Amalgamated Local 252, Toronto, for 19 years. During that time, he served on various Union committees and delegations, both in Canada and the United States. In 1964, Mr. Lee was appointed to the UAW organizing staff.

JOHN W. MURRAY

In August of 1981, Mr. Murray was appointed as a part-time member of the Board representing management. Mr. Murray earned a B.A. degree in Maths and Physics as well as a M.A. degree from the University of Western Ontario. Having served as a Lieutenant with the Royal Canadian Navy during the Second World War, he commenced a career in sales in 1946. He joined the Purchasing Department of John Labatt Ltd. in 1956, becoming Director of Purchasing in 1957. He subsequently held a number of Senior Management positions in the Labatt Group of companies before becoming Vice-President of International Labatt Brewing Co. in 1979. He held this position until his retirement in January of 1982.

F. WILLIAM MURRAY

Mr. Murray was a part-time Member of the Board representing management from 1965 to February of 1980, when he assumed a full-time position on the Board. From 1948 to 1963, Mr. Murray was employed as the Manager of the Motor Transport Industrial Relations Bureau, which served as the labour relations representative for groups of companies in Ontario and Quebec. In 1963 he formed his own industrial relations consulting firm and was active in industrial relations consulting work for many trucking firms and related industries. Since 1971 Mr. Murray has been a Member of the Public Service Staff Relations Board. He is also a Member of the Board of Trade Industrial Relations Committee and the Personnel Association of Toronto.

PATRICK J. O'KEEFFE

Mr. O'Keeffe has been a labour representative Member of the Board since 1966 and presently he serves in that capacity on a part-time basis. A long time union activist, he participated in the trade union movement in Britain and Australia prior to his arrival in Canada. In Canada, Mr. O'Keeffe was a member of the United Steelworkers of America and the Canadian Union of Public Employees. He has held positions of steward, secretary and president of various local unions. He is a past National Representative of C.U.P.E. and presently holds the office of Ontario Regional Director of C.U.P.E., and Vice-President of the Ontario Federation of Labour.

ROBERT W. REDFORD

Mr. Redford has been a part-time Member of the Board representing management for the last four years. Having graduated from Queen's University with a degree of B.A. (Economics) in 1963, he joined Canada Packers Inc., where he worked for 16 years in the employment relations function. His final position at Canada Packers was Corporate Manager, Personnel Services. Mr. Redford is currently the Executive Directive of the Personnel Association of Toronto and the Personnel Association of Ontario.

JAMES A. RONSON

Mr. Ronson was appointed a full-time Member of the Board representing management in August of 1979. He graduated from the University of Toronto with a B.A.Sc. in 1965 and a LL.B. in 1968. After his call to the Bar, Mr. Ronson practised law in Toronto. During his practice he served on numerous boards of arbitration as employer nominee.

MICHAEL A. ROSS

Mr. Ross was appointed as a part-time Board Member on the labour side in February, 1980. Mr. Ross, who has studied economics and political science at Laurentian University, has been the Business Manager of the Labourers' International Union of North America, Local 493 for the past 12 years. He has held the position of Secretary of the Sudbury and District Building & Construction Trades Council for four years and has been President of the Council for two years. He is presently serving his second four-year term as Vice-President of the Ontario District Council of the Labourers' Union and is in his second year as a Director on the Board of the Sudbury Regional Development Corporation.

WILLIAM F. RUTHERFORD

Mr. Rutherford has been a full-time Member of the Board representing labour for three years. He was the Houdaille Plant Chairman for the UAW for 37 years. He was a Member of the Oshawa District Labour Council between 1944 and 1977 and a Member of the Canadian UAW Council during 1948 and 1971. Mr. Rutherford has served on the Board of Referees of the Unemployment Insurance Commission for 12 years.

INGE M. STAMP

Appointed a full-time Board Member representing management in August, 1982, Ms. Stamp comes to the Board with many years of experience in the personnel and labour relations field at Bechtel Canada Limited. Having joined that firm as Senior Secretary to the Vice-President of Labour Relations in 1969, Ms. Stamp became Administrative Assistant in 1974 and Labour Relations Assistant in 1975. In 1977 she was appointed labour relations representative, a post she held prior to her appointment to the Board. In this capacity, Ms. Stamp was appointed, by the Industrial Contractors Association of Canada, as a member of several employer bargaining agencies designated to negotiate collective agreements on behalf of management. Ms. Stamp has been very active in the functions of the Industrial Contractors Association of Canada and since 1979 has served as treasurer responsible for the General Funds and the Ontario Industry Funds. She has represented Bechtel Canada Limited at negotiations of the Boilermaker Contractors Association and annual conferences of the Canadian Construction Association.

ROBERT J. SWENOR

Mr. Swenor was appointed as a part-time Board Member in February, 1982, to represent management. Mr. Swenor, who holds the degrees of B.A. and M.B.A. from McMaster University and a certificate in Metallurgy of Iron and Steel, has been employed with Dominion Foundries and Steel Ltd., Hamilton, since 1970 and is presently its Assistant Secretary. He is Vice-Chairman of the Canadian Manufacturers' Association Legal Advisory Committee on Environmental Law and also serves on the Legislation Committee, the Sub-Committee on Corporation Law and the Environment Quality Committee of that organization.

E.G. (TED) THEOBALD

Mr. Theobald was appointed as a part-time Board Member representing labour in December, 1982. From 1976 to June, 1982, he was an elected member of the Board of Directors of O.P.S.E.U., and during this period served a term as Vice-President. Active in the trade union movement since 1971, Mr. Theobald has served as President and Chief Steward of a 600 member local union. He has served on numerous union committees and has either drafted or directly contributed to several labour relations related reports. He is experienced in the grievance procedure and arbitration. At present, Mr. Theobald is employed by George Brown College, as a teaching master in the Mechanical Design and Construction Department.

W.H. (BILL) WIGHTMAN

Mr. Wightman was first appointed to the Board 1968, becoming a full-time member in 1977, and resigning from the Board in April 1979, in order to serve as a member of the 31st Parliament of Canada and Parliamentary Secretary to the Minister of Labour. He was re-appointed as a full-time Board Member representing management in May, 1981. Following 12 years as an industrial relations specialist in the petro-chemical, food processing and health care industries in the U.S. and Canada, he became Director of Industrial Relations for the Canadian Manufacturers' Association from 1966 to 1977. Concurrently he served as the Canadian Employer Delegate and Technical Advisor to the International Labour Organization in Geneva and the Organization for Economic Co-operation and Development in Paris, and as a member of the Canadian Manpower and Immigration Council, the Unemployment Insurance Advisory Committee and the Attorney-General's Committee on Prison Industries. He was a founding member of the McMaster Medical Centre Advisory Council on Occupational Health and Safety. His writing credits include papers presented at the World Employment Conference in Geneva and symposia at Vienna and Panama City. He is a graduate of Clarkson College (BBA'50) and Columbia University (MS'54) where he lectured while engaged in doctoral studies.

JAMES P. WILSON

For a number of years Mr. Wilson was the Director of Operations for a multi-trade contractor in the construction industry. He has been the Labour Relations Consultant to the Electrical Contractors Association of Ontario for the last 10 years. Mr. Wilson has served as the President of the Electrical Contractors Association of Ontario, Charter Member of the Canadian Electrical Contractors Association, a Director of the Toronto Construction Association, Vice-President of the Ontario Federation of Construction Associations and Director of the Toronto Electrical Club. In January of 1981, Mr. Wilson was appointed as a full-time Board Member representing management.

NORMAN A. WILSON

Mr. Wilson was appointed a part-time Board Member representing labour in 1979. A member of Local 721 of the Iron Workers since 1949, he became its Business Agent in 1955. Later, in 1958, he was appointed General Organizer for the International Union, covering Quebec and the Maritime Provinces. Eventually this assignment was enlarged to include the western provinces and Ontario. In 1968, Mr. Wilson became the Executive Director of the Canadian Operations of the Union. Mr. Wilson has been an active participant in a number of Provincial Building Trade Councils. He participated in the formation of, and later became a member of, the Construction Industry Review Panel of Ontario and has acted as Co-Chairman of that Panel.

V HIGHLIGHTS OF BOARD DECISIONS

No adjournment because advisor on vacation

In this application for certification, the Board considered a request by the employer for an adjournment of the certification hearing. The owner of the employer company left for a golf tournament in Florida one week after he had been formally advised of the date set for the hearing. The owner was not expected to give evidence, but counsel for the employer stated that the owner was counsel's sole advisor.

The Board reviewed the jurisprudence on the subject of adjournment before the Board, including *Nick Masney Hotels Limited*, [1967] OLRB Rep. Nov. 833, 834-835, affirmed [1970] 3 O.R. 461, 465-466 (C.A.); *Montgomery Elevator Company Limited*, [1978] OLRB Rep. Jan. 83; and *Re Flamboro Downs Holdings Ltd.* (1979), 99 D.L.R. (3d) 165, 168-169 (Ont. D.C.). The Board noted that its practice is to grant adjournments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party. Expedition of the certification process is essential. As long as the party has adequate notice of the hearing, an adjournment will not be granted merely for the convenience of the party or its representative. On the facts of the case under consideration, the request for adjournment was refused.

As a result, the Board went on to hear and consider evidence from two employees who claimed they were threatened by a union official into joining the trade union. The Board noted that the trade union did not file membership evidence in respect of these two employees, but decided to consider their allegations because such trade union activities, if proven, could taint the reliability of other membership cards.

On the basis of credibility, the Board concluded that no improper threats were made by trade union officials. The trade union's membership evidence which exceeded 55% of the employees in the bargaining unit, was therefore considered reliable. A certificate was issued to the union. *Don's Sportswear*, [1983] OLRB Rep. Apr. 516.

No non-union option on ballot where each competing union having support in excess of 55%

Two trade unions sought certification in respect to the same bargaining unit. Both unions filed membership evidence showing the support of more than 55% of the employees in the unit, with some overlap of membership between the two unions.

The Board was required to consider whether the vote it would order among the bargaining unit employees should permit a choice between the two unions only, or a choice between the two unions and a no union choice as well. The Board reviewed the relevant jurisprudence. It noted that employees will normally only be given a choice between the two applying unions, where as in this case, a non-displacement application for certification is made, there is no request for a pre-hearing vote, and both unions have membership support in excess of 55%. Where, however, objecting employees establish a numerically relevant and voluntary petition, the Board will normally include a no union option in the representation vote since the employees would have been presented with that option if the union's application had been processed on its own. Other factors, too, may require the vote to include a no union option, such as charges against union membership evidence. There have been cases, the Board noted, where the no union option was included on the ballot, but these involved pre-hearing votes, or situations where at least one of the trade unions had less than 55% membership evidence.

The Board noted section 103(6) (a) of the *Labour Relations Act*, which stipulates that "the Board *may* include on a ballot a choice indicating that an employee does not wish to be represented by a trade union". On the facts of the particular case, the Board ordered a representation vote without the no union option. In the Board's view, when two unions come before the Board with membership evidence in excess of 55% such that each, on its own, has a level of membership support that would normally enable it to be certified outright, the contest is properly viewed as a contest between the unions. This conclusion is reinforced by the fact that none of the membership evidence was challenged. Further, the statement of desire of the objecting employees had to be ignored, pursuant to Board policy, as none of the objectors appeared at the hearing to give evidence in support of the petition. The existence of overlapping membership support did not in any way cast doubt on the credibility of the membership evidence. *Bioshell Inc.* [1983] OLRB Rep. Apr. 843

Inflation Restraint Act extending life of Collective Agreement

The trade union applied under section 89 of the *Labour Relations Act*, alleging that the employer violated section 13 of the *Hospital Labour Disputes Arbitration Act* ("H.L.D.A.A."). Section 13 of the H.L.D.A.A. freezes all terms and conditions of employment where notice to bargain has been given, and where "no collective agreement is in operation". The issue in this case was whether the complaint was properly brought, as it was argued by the employer that a collective agreement was in operation. Although the collective agreement had by its own terms expired, the issue was whether the *Inflation Restraint Act*, S.O. 1982, c.55 ("I.R.A.") had the effect of extending the life of the agreement.

The Board noted that the I.R.A. applied to the parties, since the employer was a hospital and was therefore covered by section 6(1)(d) of the I.R.A. Next, the Board inquired as to whether the collective agreement in question was actually extended by the I.R.A., and the Board determined that section 9 had the effect of continuing the otherwise expired collective agreement in force. The Board therefore concluded that there was by operation of law a collective agreement in force between the parties at the relevant times. In support of its conclusion that the collective agreement's life was extended, the Board noted that the I.R.A. suspends the right to resort to conciliation or interest arbitration under the H.L.D.A.A. The Board therefore dismissed the trade union's complaint. *Doctors Hospital*, [1983] OLRB Rep. Apr. 500.

Format of petition accepted by Board

A group of employees applied for a declaration terminating the bargaining rights of the trade union. In support of their application, the applicant employees submitted a petition with a sufficient number of names to warrant a decertification vote. The petition contained a list of signatures, and on the base of all the names was hand printed, "The above employees have signed freely on termination of union 204 at K Mart 5417".

The applicants testified that when the employees signed the petition, it did not contain the words printed at the base of the names. Their explanation was as follows: when the applicants initially attended the offices of the Labour Relations Board, they were informed by an official who they could not identify that Form 17 was the correct document to complete in an application for decertification. However, if there was insufficient space on Form 17, then another piece of paper could be used so long as the signatories were shown Form 17. The applicants further testified that when the petition was filed with the Board another official whom they could not identify required them to add a heading of some sort to the document. They therefore added the words at the base of the names.

For a considerable period of time the applicants were involved in their decertification activities. The applicants testified that each signatory was shown Form 17 prior to signing.

The applicants argued that the Board ought to consider the petition in conjunction with Form 17 as sufficient evidence in writing of the desire of the employees who signed the petition to oppose the union. The fact that the employees no longer wish to be represented by the trade union is supported by the oral testimony of the applicants, which showed a pattern of meetings in opposition to the union, as well as trade union behaviour at a contract ratification meeting which was unacceptable to some employees.

The employer, in support of the application, argued that the Board must adjudge the "ostensible wishes" of the employees from the direct sponsors of the petition and the circumstances. The union cited a number of cases which in its estimation stood for the proposition that all "blank" petitions were seriously flawed because, even with an explanation, they did not indicate signification of opposition to the union in writing.

The Board distinguished the cases cited by the union. In those cases, the petitions were orally explained to the signing employees. In the present case, one of the Board's own forms - Form 17 was used to explain to employees what they were about to sign. The Board referred to the problem of having the written signification of opposition to the union physically separate from the document containing the signatures. The validity of such documentation depended on credibility. The Board concluded that the demeanour of the witnesses and the relevant history of events meant that the signatories to the petition were in fact shown Form 17. Thus there was adequate evidence in writing of opposition to the trade union, and a representation vote was ordered. *K-Mart Canada Limited*, |1983| OLRB Rep Apr. 561.

Termination petition held voluntary

The applicant employee sought to terminate the bargaining rights of the trade union, pursuant to section 57(2) of the *Labour Relations Act*. The trade union opposed the application arguing that the petition submitted by the applicant was incorrect in form and did not reflect the voluntary wishes of the employees in the bargaining unit.

The applicant was an employee of the employer for about 27 years. During a recent strike, following certification, he made his opposition to the union well known. He consulted counsel, who advised him as to the procedure for a termination application, and who also advised him not to consult management with respect to his efforts to terminate the union's bargaining rights. The applicant collected employee signatures in opposition to the union during the day, on his own time, about 100 yards from the employer's premises. The applicant submitted two separate petitions. The second petition was delivered to the Labour Relations Board by a secretary employed with the employer, on her lunch hour; she was also a member of the bargaining unit. The applicant had no managerial functions within the employer's operation.

The Union raised a number of objections to the applicant's petition. First, the union noted that the preamble to the petition referred to the local union, while in fact the International union was the certified bargaining agent. The union argued that the Local referred to in the petition merely administered the affairs of the bargaining unit. The Board rejected the union's objection to the petition. The Board found that the Local conducted all union meetings, and held itself out as the bargaining agent. As there was no other union involved, no possibility of confusion existed. The fact that the document was drafted by laymen was also a relevant factor. The Local in question was an agent of the International. The test to be applied is whether the intention and purpose of the document is clear and unequivocal in the minds of the persons signing.

The Board then considered the union's contention that the petition was not voluntary. Specifically, the union argued that the applicant's position in the plant rendered the signatures involuntary. The Board rejected this contention. The applicant had no managerial or supervisory functions. The Board will look with some care at a petition filed by an employee who is particularly close to management. But such an employee should not lightly be deprived of the right to participate in the processes under the Act respecting union representation. Further, the strike which preceded this application essentially revealed the position of each employee regarding the union. There was no reason for employees to feel they would be revealing their attitudes toward the union.

The Union also referred to the fact that a company secretary delivered one of the petitions to the Board. The Board refused to ascribe any weight to this fact. The employees were unaware of her involvement, and so it was of little consequence. The fact that she was a member of the bargaining unit was also considered relevant.

The union referred to the fact that the applicant gathered signatures openly at the plant gates. The Board rejected this objection as well. There was no evidence that any member of management came through the gates at the relevant times. The Board agreed that the possibility of observation by members of management must be carefully examined, but that this factor carried little weight in the particular case. There was no evidence to the effect that management was present at all at the plant at the relevant times. Moreover, with the building being at approximately 100 yards distance from the place where the applicant stood, it was unlikely that the employees would have felt a looming and unseen presence as they were approached by the applicant.

The union raised evidence of a meeting in which a member of management, following the strike, informed employees who had not participated in the strike that raises and promotions could only be forthcoming with regard to the collective agreement, and would therefore be restricted under the union. The Board stated that there was no factual link between this meeting and the applicant's petition. There was no evidence that employees were aware of the statement; or that the employer communicated to any employees that it intended to support a petition for termination.

The Board applied the test of whether the petition represented a reliable expression of employee wishes, reasonably free from a concern that their expression one way or the other would come to the knowledge of their employer. On the other hand, the Board also stated that employer knowledge that a petition is being taken up against a union, or the recognition by employees that an employer would prefer to be without a union, were not in themselves matters which disturbed the Board. Based on this definition of "voluntary", the Board accepted the applicant's petition and ordered a representation vote. *Irwin Toy Limited*, |1983| OLRB Rep. Apr. 536.

Enforcement of unsatisfied arbitration award not proper purpose for seeking related employer declaration

The applicant union had a collective bargaining relationship with Sepcographics Incorporated, which is a wholly owned subsidiary of Total Marketing Incorporated. In an arbitration award, Sepcographics was ordered to pay $3,403.39 to the applicant. At the time Sepcographics was insolvent and subsequently made an assignment in bankruptcy. The arbitration award which remains unsatisfied was registered in court as a judgment debt. The union, seeking to realize the judgment against the parent company Total Marketing, sought a declaration that Sepcograhics and Total Marketing are related employees within the meaning of section 1(4) of the *Labour Relations Act*.

The Board noting that section 1(4) was enacted for the limited purpose of preventing the undermining of bargaining rights, refused to extend that provision "to give a party to a collective agreement the right to a "deep pocket" recovery of an unsatisfied debt against a related corporation." While the Board sympathized with the hardship suffered by the union it stated that absent clear and unequivocal language in the Act, section 1(4) could not be interpreted as providing a remedy for the situation. *Total Marketing Incorporated*, [1983] OLRB Rep. Apr. 616.

Proposed new plants included in unit

This was a certification application. The employer's existing plant was within the city limits of Cornwall, but the evidence was that two plants were currently being constructed some three miles away and outside the city limits. The Board held that where a relocation is intended at the time of certification, and the new site is within the labour market of the existing site, the bargaining unit should be described to embrace the new location. Accordingly, the unit was described to include the two new plants. *Dynamic Closures Limited*, [1983] OLRB Rep. Apr. 521.

Employer communications within bounds of free speech – Breach of silent period rule not causing Board to set aside vote

In an application for certification by way of a pre-hearing vote, OPSEU lost the vote. However, it requested the Board to set aside the results of the vote and certify the union under section 8 or alternatively to direct a new vote and award damages to the union. For the relief requested, OPSEU relied on three letters received by employees, two originating from the management of the hospital and the other presumably from a rival trade union. In addition, the union relied on the fact that the word "NO" was discovered written on the voter's screen by an unknown person.

The Board reviewed the contents of the employer letters and held that, even when read in the context of the letter written by the rival union, there was nothing in the contents which breached the Act. The communications were found to be within the bounds of the freedom of expression guaranteed under section 64 and not constituting coercion, intimidation, threats, promises or undue influence. While the Board found that one of the employer letters had been delivered to two employees (out of 285) on the voters' list in breach of the silent period, it did not find the breach to be of such a nature as would cause the Board to take any action. The Board stated that it was safe to speculate that the writing on the screen was done by one of the employees. It was covered up by the returning officer immediately upon being discovered.

Although the word "NO" remained on the screen for an indefinite period, the union scrutineer signed the "Confirmation of Conduction of Election" form. In the circumstances the Board was not prepared to conclude the employer had breached the Act in this regard or that the vote was affected to the extent that the Board should disregard its results. Accordingly, the application was dismissed. *Toronto General Hospital,* [1983] OLRB Rep. Apr. 607.

Preference to blind person not breach of duty of fair representation

This was a complaint of unfair labour practice alleging that the respondent union had breached the duty of fair representation. The collective agreement in question, while providing that applicants for job vacancies be considered on the basis of merit, ability, experience and seniority and giving priority to employees in the department where the vacancy occurs, also provided that registered blind persons will be given preference in transfers, promotions, demotions, lay-off and recall.

The complainant was fully sighted and during his short period of employment had impressed management with his abilities and qualifications. When a vacancy arose for a circulation clerk lead hand, the only applicants were the complainant and one Mrs. Davey, a registered blind person, who had greater seniority than the complainant. The employer selected the complainant to fill the position. Mrs. Davey filed a grievance requesting that she be awarded the job. The union, which had throughout taken the position that under the collective agreement Mrs. Davey was entitled to do the job, referred the matter to arbitration, when it was not resolved during the grievance procedure. The union's interpretation of the agreement was that in a competition between a sighted person and a blind person, the latter must necessarily be preferred.

While the complainant asserted that the union had a duty to represent him at the arbitration hearing, the union took the position that it cannot represent both him and Mrs. Davey. Accordingly, at the hearing the complainant was left to represent his own interest and chose not to participate actively. The union on the other hand represented Mrs. Davey's interests. At the time of the Board hearing, the arbitration board had not yet handed down its award.

Before the Board, the complainant alleged, *inter alia,* that the union favoured Mrs. Davey's interests over his and ignored his rights because he was sighted. The Board, noting that trade unions are frequently obliged to take positions which favour one employee over another, stated that this by itself does not result in a breach of the duty of fair representation. The conduct of the union was based on its honest interpretation of the collective agreement. The Board concluded that the union's interpretation was not so unreasonable as to indicate that it was reached in an arbitrary manner.

The Board also concluded that the union's preference given Mrs. Davey over the complainant's interests was not discriminatory. Section 68 is aimed at protecting discrimination on the basis of invidious or unsupportable grounds. The Board said "We live in what is very much a sighted world. Unfortunately all too often blind persons are passed over for jobs even when they may be qualified to perform them. Against this background, I do not believe that a preference to registered blind employees is the type of discrimination which the legislature sought to prohibit by section 68 of the Act". The complaint was dismissed. *J. Lewis Humphreys and Service Employees Union, Local 204,* [1983] OLRB Rep. Apr. 530.

Union certified without vote under section 8

The applicant trade union sought certification, and charged the employer with committing unfair labour practices in breach of, *inter alia,* sections 64, 66 and 70 of the *Labour Relations*

Act. As a result of these alleged violations, the union argued for automatic certification without a vote pursuant to section 8 of the Act.

The employer manufactured insulating glass. Active discussion among the employees about the desirability of joining a trade union began to take place. There appeared to be widespread support for a union, and seven employees – including four who were soon to be discharged – attended at the union hall to pick up blank membership cards.

The following day, the employees were summoned to an unusual meeting. One of the owners of the plant said that a union would, if established, "kill the company", and repeated this phrase several times. He said that the company would have to shut its doors if a trade union was established, and that everything – such as overtime – would be restricted. Furthermore, the owner said that the company's "open door" policy would not longer be possible. The company's financial difficulties were outlined, and the employees were told they were lucky to have a job. The owner suggested an employee committee instead of an outside trade union. He asked employees to be patient, and that wage increases would soon be forthcoming. At the end of the meeting, the owner asked anyone who still supported the union to raise his hand. No one did. The evidence suggested that the owner's speech was effective, in that employees who had earlier indicated an interest in the trade union no longer were willing to sign membership cards. In total, 30% of the bargaining unit employees signed membership cards.

The day following the meeting four employees active in organizing the trade union in the plant were terminated. Two of the four were specifically told they were being terminated for opposing the company. All four separation slips indicated that the reason for termination was "causing dissention among employees". One of the owners admitted to the Board that the four were terminated for their trade union activities. Subsequently, the four employees were reinstated as part of a "without prejudice" settlement.

The Board concluded that the employer's remarks to its employees at the meeting included direct and immediate threats to their job security and continued livelihood, should they seek to exercise their statutory right to form or join a trade union. Those remarks constituted a serious breach of sections 64 and 70 of the Act. The Board also held that the discharge of the four employees was motivated solely by the employer's belief that they were supporters of the trade union, and constituted a breach of sections 64, 66 and 70 of the Act.

The Board proceeded to consider the section 8 applications for certification. The Board noted that three conditions must be satisfied so as to entitle the union to be certified under section 8: first, the employer must have contravened the Act; second, the contravention must be of such nature that the true wishes of the employees would not likely be ascertained in a representation vote or otherwise; and third, the applicant union must have membership support adequate for collective bargaining.

The first two conditions were satisfied. First, the Board had found that the employer had contravened the Act. Second, this was clearly a case where the true wishes of the employees were not likely to be ascertained by the conventional means available. The Board was left to determine the third condition, i.e. whether there was membership support adequate for collective bargaining. The Board noted that the statutory predecessor of section 8 required the support of more than 50% of the employees in the bargaining unit. By eliminating the 50% requirement, the Legislature contemplated the possibility of certification even where the applicant's membership support falls below the minimum level required for entitlement to a representation vote. Where an employer's illegal response is so massive and so early as to prevent a trade union from ever attaining the level of support needed for a representation vote, the union may be entitled to be certified under section 8. The Board expressed sympathy with the need for small businessmen to economize during difficult economic times, but stated that these needs cannot be enforced at the expense of the statutory rights of others.

On the facts of the case under consideration, the Board noted that had it not been for the unlawful interference of the employer, the union might well have garnered at least the 35% support necessary for the taking of a pre-hearing representation vote. The evidence was that a substantial minority had already signed membership cards at the very beginning of the union's campaign. A number of other employees expressed interest in the trade union. This support was likely stifled by the speech to the employees by one of the owners, as well as the discharge of the four union supporters. The Board held that the union had a substantial and workable core of support. Accordingly, the Board ordered that a certificate be issued to the applicant union in respect of the bargaining unit. *Trulite Industries Limited*, |1983| OLRB Rep. May 821.

Absence of local's name in application not fatal where no confusion

Local 586 of the International Brotherhood of Electrical Workers ("I.B.E.W.") applied for certification. The membership evidence provided by the applicant Local showed, in the case of each member employee, the name of the I.B.E.W. In no case was Local 586's name indicated on any of the employee membership applications. Each membership card did have a space in which to enter the number of local union but in each case it was left blank. Membership fees were $2.00 per employee, and the receipts provided by Local 586 to the employees did contain Local 586's name.

The Board considered whether the applicant Local's membership evidence was valid. The Board referred to its decision in *Bernardin of Canada Limited*, |1975| OLRB Rep. Oct. 737, where on similar facts, the membership evidence was rejected. In *Bernardin*, the Board indicated that evidence of membership in the international parent will not be used as evidence of membership in a local thereof. The Board in the present case noted the applicant Local's argument, to the effect that its evidence was materially different than the evidence before the Board in *Bernardin* and that there was no doubt that the employees in the present case were knowingly applying for membership in the applicant. The Board concluded that the applicant's organizer may have been careless, but on the facts, it was clear from viewing together the application and related receipt, that each employee knew that he was signifying the applicant Local to be his exclusive bargaining agent. The membership evidence was held to be valid, and a certificate issued to the applicant. *Union Electrical Supply Co. Ltd.*, |1983| OLRB Rep. May 829.

No employee confusion as to identity of union

This was an application for certification by a local union. In a pre-hearing vote conducted by the Board, a majority of employees in the bargaining unit voted in favour of certification. However, the respondent employer argued that the Local was not entitled to be certified. Prior to applying for certification, the Local was reorganized. It was expanded to cover other local members of the parent International in various municipalities. Furthermore, the Local's name was changed from "Hotel, Restaurant and Cafeteria Employees Union, Local 75" to "Hotel Employees and Restaurant Employees Union, Local 75". In addition, the parent International also underwent a change in name.

Despite the Local's change of name, the application for certification was filed in the *old* name of the Local. Furthermore, one set of membership cards included the old name of the International, and substantially (but not precisely) the old name of the Local. Another set of membership cards included the new name of the International but the old name of the Local. Further variations could be found on the pre-hearing ballot, as well as the Local's campaign literature.

The respondent employer argued that the mergers had the effect of creating a different trade union from the applicant. In the alternative, the employer argued that there would be confusion in the minds of the employees as to which union they were joining, such that the Board should disregard their membership evidence and the results of the representation vote. The applicant Local argued that neither the merger nor the change of name affected the essential identity of Local 75. Further, the innocent name in the application was a simple and perhaps natural mistake. The Local pointed out that there was not the slightest evidence of any actual confusion on the part of the employees. At all times there had been only one union on the scene soliciting support, and it was clearly Local 75.

The Board noted that at all relevant times, Local 75 was the only trade union active at the employer's business. Despite the variations as to name, all documents and literature generally referred to "Local 75". After it's merger with the other locals, Local 75's operations remained substantially identical as previously. The officers, business agents, address, bank account and collective bargaining activity remained the same. While the Board noted that the trade union had been sloppy in its application, and that such sloppiness ought not be encouraged, despite mergers and name changes, there had been no substantive change in Local 75's legal identity; nor was there any real basis for confusion as to what the employees were joining or voting for. To accept the employer's argument in this case would be unduly technical, as well as inequitable. This was not a case of confusion between two locals, or between a local and a parent. The employees clearly knew which local they were supporting. The Board held that the membership evidence and pre-hearing vote were valid, and issued a certificate to the applicant. *Food Corp. Limited*, [1983] OLRB Rep. May 636.

Transaction not finalized – Successor employer application premature

The applicant trade union sought a declaration that the respondent company had or would shortly acquire the "business" of the original employer. The original employer owned and operated a nursing home, and was licensed by the Ministry of Health under the authority of the *Nursing Homes Act*. At the time of the hearing, the original employer was still operating its nursing home to partial capacity, but had given its employees notice of termination pursuant to the *Employment Standards Act*. The original employer and the respondent had executed an agreement of purchase and sale, in which the respondent was to acquire the employer's license, purchase land from the employer at a different location from the old nursing home, construct a new facility, and have the residents of the old facility transferred to the new one. The new facility was not yet completed, and none of the residents had been transferred. The respondent company had not yet received formal Ministry of Health approval for the necessary operating license. Further, it was not yet clear what would happen with the old facility; there was some possibility that it would remain open.

The Board noted that both the trade union and the respondent were interested in having the Board make a section 63 declaration on the facts as they stood at the date of the hearing. Nevertheless, the Board concluded that no determinations should be made until the transactions said to constitute a transfer of a business have been completed. The Board stated that preliminary opinions based on hypothetical facts could create as much mischief as they resolve, if not more.

Not only would such an opinion encourage a revision or restructuring of transactions to which section 63 might otherwise apply but, in addition, there could be litigation about the effect of the opinion itself and whether the transaction was actually consummated in the form upon which the Board's opinion was based. In the Board's view, since close cases will often turn on subtle shadings of fact, it would be unwise to render opinions on what will inevitably be less than complete information. Parties in the labour relations community could frequently be tempted to refer hypothetical fact situations to the Board on a number of issues, section 63 being only one of them. The Board must therefore decline to give preliminary opinions on hypothetical fact situations. *Daynes Health Care Limited*, [1983] OLRB Rep. May 632.

Settlement of grievances during negotiations not breach of fair representation

The complainant claims that his trade union violated the section 68 duty of fair representation in its handling of his grievance against the employer. During a lengthy strike, picket line activity became particularly intense and obstructive. In response, the employer selected a number of employees for discharge and other forms of discipline. The union's intervention led to an understanding as part of a strike settlement that there would be no discharges, that any discipline imposed would be no more severe than 30 day suspensions, and that the parties would expedite grievances filed in relation to such disciplinary action. Subsequently, 26 employees were disciplined and 23 grievances were filed with the Ministry of Labour pursuant to the expedited arbitration procedure provided by section 45 of the *Labour Relations Act*. The grievances were consolidated by agreement of the parties, so as to expedite the arbitrations and to avoid the repetition of evidence.

The union decided to retain counsel, rather than handling the case through its lay staff. In total, 2 lawyers and an assisting law student handled the matter. Counsel met with all of the grievors prior to the commencement of the case and investigated the grievances thoroughly. During the hearing, the arbitrator made an interim ruling that was harmful to the union's arbitration strategy. Counsel considered the situation in its entirety, and decided that a settlement would be the best solution. The settlement was approved by the grievance committee of the union, even though such approval was unnecessary and even unusual. The complainant originally received a five-day suspension for his activities on the picket line. The settlement resulted in a commitment by the employer to rely upon the five-day suspension only in the context of any future alleged misconduct arising out of "participation in any future work stoppage whether legal or illegal . . ." The union contended that the settlement was likely more favourable to the complainant than an arbitration award might have been. There was ample evidence of the complainant's obstructive conduct on the picket line. Counsel for the union in the arbitration case was convinced that had the complainant taken the witness stand, he would have prejudiced his case. Counsel wrote the union a six-page opinion letter recommending a settlement.

The Board held that the facts reveal nothing to suggest a violation of section 68 of the Act. The consolidation of the grievances was neither arbitrary nor discriminatory, and was even commendable. The hearing was conducted in a perfectly reasonable manner. The union's counsel had a complete grasp of the case, and were fully competent to recommend settlement. There was no evidence that the complainant's case was settled as a trade-off for another employee's success in the grievance procedure. There was no evidence that the settlement was motivated by the desire to save money either, although the Board noted that both parties were legitimately concerned with the time and cost involved in such a massive arbitration proceeding. The complainant's grievance was settled after a careful consideration of the grievor's conduct and the applicable legal principles. The Board dismissed the complaint. *Stelco Inc.* [1983] OLRB Rep. May 771.

Infiltration by spy during lawful strike held unlawful

The union originally filed a complaint against both Automotive Hardware and Securicor Investigations, alleging that they had entered into an agreement under which the latter would provide one of its employees, to pose as an employee of Automotive, for purposes of infiltrating the union and acting as "agent provocateur" during a lawful strike against Automotive. Early in the proceedings, the union settled the strike with Automotive and withdrew the complaint against Automotive. The Board in a prior decision ruled that the complainant union was entitled to proceed against Securicor alone.

In proceedings against Securicor, the Board heard extensive evidence relating to the activities of the person inserted into the union. He posed as a striker, participated in picketing and collected strike pay. The Board received extensive documentary evidence of regular reports filed by him with Automotive, many of which were concerned with union related matters, including the views of the strikers with respect to the issues in dispute at the bargaining table and the rifts within the union. The Board also found that the infiltrator engaged in unlawful activity and counselled others to do the same while posing as a striking employee.

The Board held that the conduct of Securicor through its employee constituted interference in the administration of the trade union and with the representation of the employees, contrary to section 64 of the Act. The Board stated *obiter* that "... the infiltration of a trade union by an employer or anyone acting on behalf of an employer during a strike or a lockout or in anticipation of a strike or lockout is, *per se*, a violation of the Act; that is, it is unlawful regardless of the stated purpose for which the infiltration is undertaken or its effect."

The Board found that Securicor's conduct prolonged the strike by an additional 5 weeks and directed Securicor to reimburse the employees for lost earnings during this period and also to compensate the union for strike pay during this period. The amounts of lost earnings and strike pay compensable were reduced in half in view of the fact that had the union not withdrawn its complaint against Automotive, Automotive may have been liable for one-half of the compensation owing.

In addition, the Board issued a declaration and a cease and desist order. Taking into account the ongoing coercive impact Securicor's conduct is likely to have on employees generally in the province, the Board also directed Securicor for a period of two years to give notice in the form prescribed by the Board's decision to any trade union that represents the employees of an employer which retains Securicor in anticipation of or during any strike or lockout. *Securicor Investigations and Security Ltd.* [1983] OLRB Rep. May 720.

Concerted refusal to apply for teaching positions not a strike

The Board of Education applied for a declaration of unlawful strike under the *School Boards' and Teachers' Collective Negotiations Act* or alternatively, under the *Labour Relations Act*. The respondent union issued "pink letters" to the applicant's teachers in the regular day school program, directing them to refrain from applying for or accepting teachers' positions in the Board's Continuing Education Program. Members were advised that if they did not comply, they would not receive assistance from their union should they later have contractual difficulties. Most of the teachers complied with the union's request.

The Board held that the refusal by the teachers to apply for positions in the Continuing Education Program does not constitute a strike within the meaning of the *S.B.T.C.N.A.* The Board ruled that the *S.B.T.C.N.A.* is designed to regulate teachers/school boards relations in respect of regular day school employment and that the reference to "school program" and "school" in the definition of "strike" in that Act was a reference to school programs and schools carried on in connection with the regular school year.

The Board also found that a strike had not taken place within the meaning of the *Labour Relations Act.* Under the definition in the Act, a "strike" is a concerted refusal by "employees". The teachers in question were not employees of the applicant in respect of the Continuing Education Program at the time of the refusal. The Board found, therefore, that their refusal related to work which was beyond the scope of their employment relationship; there being no obligation upon the teachers in question under the statute or under the collective agreement to staff the Continuing Education Program. Consequently the application was dismissed. *Ottawa Board of Education* [1983] OLRB Rep. May 694.

Manipulation of negotiating committee and misrepresentation of employer's offer breach of section 68

A group of the City's "technical" employees, who had occupied the higher paid job categories, filed a complaint against their union. The union had, during recent sets of negotiations, settled for lump sum increases which compressed the wage differentials between them and the lower paid job categories. When two members of the union's negotiating committee opposed this approach, they were removed from office. The complainant not only alleged that this conduct was an unfair labour practice but that misrepresentation by the negotiating committee of the employer's offer when it was submitted to the membership contravened the duty of fair representation.

The facts required the Board to examine both the substantive and procedural aspects of the duty imposed by section 68. The Board held that the union's decision to obtain the same amount for all job categories was motivated by a desire for a more equitable response to the relative impact of inflation on the different groups of employees. Thus, there was no violation of section 68, although the interests of the technical employees conflicted with those of the majority of employees, since the objectives of the majority were achieved by means that were honest, open and devoid of ill-will or hostility aimed at the minority.

The Board also found that the removal of the two committee members was not a breach of section 68 although there was no specific provision in the union's by-laws for removal of committee members. The two members had taken a position clearly opposed by the membership. The removal was the culmination of an internal political struggle in which the superior political skill of the other members of the committee had prevailed. The union had taken procedural safeguards to ensure that the decision was made properly.

However, the Board expressed concern with respect to the restructuring of the negotiating committee after the removal of two of its members and the misrepresentation of the employer's offer when it was submitted to the membership. While the union's by-laws required the committee to be comprised of five members including a Chairman, the committee was restructured to consist of only four members with no Chairman. In the absence of an explanation, the Board concluded that this was done to ensure that the technical employees could not obtain majority support in the committee. Also, in response to a direct question from a member, the union stated that there was only one offer from the employer (i.e. the one favourable to the union's objective) when in fact there had been three alternative offers, including one favouring the position of the technical employees. Although a union may not have a positive duty to submit an offer to its membership, the union does have a duty of fair and honest disclosure when it does so. The Board concluded that the manipulation of the negotiating committee structure contrary to the by-laws and the misrepresentation of the employer's offer were designed to suppress the interests of the minority. While the departure from a union's by-laws by itself does not constitute a breach of section 68, the motive for doing so and the misrepresentation caused the Board to find a breach of the duty of fair representation on the part of the union through its officials. *Corporation of the City of Thunder Bay*, [1983] OLRB Rep. May 781.

Persons supplied by employment agencies employees of respondent

The essence of this unfair labour practice complaint was that the employer had contravened the Act by terminating or reducing the hours of the grievors, who were persons supplied by various employment agencies, because of a grievance filed by the union claiming that these persons were covered by the collective agreement. The union also contended that the employer contravened section 64 when it substantially increased its use of workers supplied by employment agencies following the certification of the union. The employer argued that the persons in question were not its employees but employees of the respective employment agencies which supplied them.

The Board found that the respondent was at least in part motivated by anti-union animus when it substantially increased its use of agency workers after the union was certified. The respondent sought to undermine the union's bargaining rights by "contracting in" temporary employees to perform work that would otherwise have been performed by employees in the unit for whom the union was certified.

The Board found the following criteria to be helpful in determining which of the two entities is the employer for purposes of the Act:

1. the party exercising direction and control over the employees;
2. the party bearing the burden of remuneration;
3. the party imposing discipline;
4. the party hiring the employees;
5. the party with authority to dismiss the employees;
6. the party who is perceived to be the employer by the employees; and
7. the existence of an intention to create the relationship of employer and employee.

Although no particular order of priority exists, considerable significance is attached to "overriding control". Examining the relationship that existed between the employees, the agencies and the respondent, particularly the relative permanence of the relationship, the existence of bargaining unit employees working side by side with agency workers performing identical work under common supervision and control and the anti-union animus which was a significant element in the expanded use of agency workers, the Board found that the agency workers were employees of the respondent at all material times for the purpose of the Act.

On the evidence, the Board concluded that the discharges and the reduction of the grievors' hours were motivated at least in part by the fact that the grievance was filed. Motions by the respondent to defer to arbitration and to apply the doctrine of estoppel against the union were denied. However, as a result of the union's undue delay in challenging the respondent's expanded use of "temporary" employees, the Board declined to grant any relief in respect of the period which preceded the filing of the grievance. *K-Mart Canada Limited* |1983| OLRB Rep. May 649.

Enforcement of settlement of safety complaint

The complainant employee alleged that he was dealt with contrary to section 24 of the *Occupational Health and Safety Act* ("O.H.S.A."). The complainant refused to do work which he claimed he had a right not to perform, pursuant to section 23 of the O.H.S.A. which provides that an employee may refuse to work where he has reason to believe that his equipment or the condition of the work place poses a hazard. Section 24 protects employees from being discharged or otherwise penalized if they express *bona fide* safety concerns, whether or not those concerns are proved to be accurate. As a result of the complainant's refusal to do the allegedly dangerous work, he was discharged by the respondent employer. He proceeded to file a section 24 complaint. A Labour Relations Officer was appointed to attempt to effect a settlement between the parties. The parties agreed that the complainant would be reinstated without back-pay, and that the complainant would withdraw the complaint. The settlement was agreed to, on the respondent's behalf, by the respondent's sales manager, but it was subsequently vetoed by the president of the respondent company. As a result, the complainant was not reinstated.

The complainant sought the enforcement of the original settlement agreement. He therefore requested reinstatement, together with back-pay effective from the date he would have been reinstated had the settlement not been altered by the respondent. Furthermore, the complainant asked for legal and other costs expended in the second proceeding before the Board. In the alternative, the complainant asked that the original complaint be re-litigated since the respondent reneged on the settlement. The respondent employer argued that as the sales manager did not have the authority to enter into the settlement, the agreement was invalid and unenforceable.

The Board rejected the suggestion that the sales manager had no authority to agree to the settlement. The settlement ought therefore to be enforced. The Board stressed that it was enforcing the agreement of the parties, which was binding upon them, rather than inquiring into the events of the complainant's case.

The Board ordered that the complainant be reinstated, and that he be compensated for all wages and benefits lost from the date he would have been reinstated had the settlement been adhered to. The complainant's request for costs, however, was rejected. The Board saw no reason to depart from its established practice of refusing to award legal costs. The Board noted that if the complainant had not been successful, the respondent would not have been able to get its legal costs either, and remedies ought to be reciprocal. *The Potato Centre*, |1983| OLRB Rep. June 940.

No prejudice because of delay – Board entertaining complaint

This was an application by two complainant employees under section 89 of the *Labour Relations Act*, who charged their union with violating the duty of fair representation required by section 68 of the Act. The respondent trade union requested the Board to refuse to entertain the complaint for three reasons: first, because of the delay in filing the complaint; second, because the complaint did not disclose a *prima facie* case; and third, because of the insufficiency of particulars given by the complainants.

On the issue of delay, the Board noted that the complainants' section 68 complaint arose out of their discharges from their employment on February 16, 1982. The union attempted to have them reinstated, but the employer was unwilling to agree to reinstatement. On or about March 12, 1982 the union's business agent advised the complainants that as a result of legal advice, the union decided not to proceed with arbitration of the discharges. The section 68 complaint in respect of this refusal to proceed with arbitration was not filed until November 2, 1982. There was, therefore, a delay of almost eight months between the time the cause of action arose and the time of the filing of the complaint. The complainants explained the delay as being attributable to delay in waiting for legal aid; time consumed in communicating with the union's head office; and financial difficulties by one of the complainants.

The Board concluded that the complainants' explanation could not sufficiently explain away all of the delay. The Board noted that delay could be either "extreme" or "unreasonable". Extreme delay warrants a dismissal on preliminary motion. Unreasonable delay may affect the remedy but does not deny the complainants the opportunity to prove the violation of the act. Section 89(4) of the Act gives the Board discretion to decide whether it will inquire into a complaint. Section 72 of the Board's Rules of Procedure requires that a complainant file allegations of wrongdoing "promptly" upon discovery of the wrongdoing. If the Board concludes that allegations have not been filed promptly, the Board may refuse to allow the evidence to be adduced or, ultimately, may only permit the evidence to be adduced upon specified terms or conditions. The Board is conscious of the need for expedition, and where there is delay, the onus may shift to a complainant to satisfy the Board that there are compelling labour relations reasons to cause the Board to exercise its discretion and entertain a complaint. The Board went on to cite *The Corporation of the City of Mississauga*, |1982| OLRB Rep. March 420, wherein the Board listed a number of factors relevant in determining how to dispose of a case involving delay. These factors are: the length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation, the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention, and the possibility of deteriorating evidence. Further, the Board in the *Mississauga* case noted that unless circumstances are exceptional or there are overriding public policy considerations, the time limit should be measured in months rather than years.

On the facts of this case, the Board concluded that the delay was not "extreme". The complainants were tardy, but this is partly explained by their desire for legal assistance and deciding how they could afford such assistance. There was no evidence that either the union nor the intervening employer were prejudiced. The extent of the delay has not been so lengthy as to suggest that there would be severe prejudice to the parties' labour relations if the complainants should be reinstated with back pay. The Board held that the union's motion with request to delay ought to be dismissed.

The Board then considered the union's allegation that the complaint failed to disclose a *prima facie* case. The complaint contained little particulars, but it did claim that the refusal to go to arbitration was arbitrary, discriminatory and in bad faith. Section 71 of the Board Rules of Procedure permits the Board to dismiss a complaint when no *prima facie* is revealed. The Board held that a *prima facie* case was revealed by the complaint, and dismissed the union's motion. The absence of particulars did not, in the Board's view, reveal the lack of a *prima facie* case. The complainants sufficiently alleged a violation of section 68 of the Act on the facts as claimed.

Finally, the Board considered the union's claim that the complaint lacked sufficient particulars, as required by section 72 of the Board Rules. The Board agreed that sufficient particulars were lacking. The Board directed that further and additional particulars be given to the respondent union to allow it to prepare its defense. *Caravelle Foods*, |1983| OLRB Rep. June 875.

Dismissal for soliciting union membership on company premises unlawful – Damages reduced by employer's bona fide offer to reinstate

The applicant union applied to the Board for certification without a vote pursuant to section 8 of the Act and filed three complaints under section 89 of the Act, all arising out of an organizing campaign conducted by the union at the company's plant in London, Ontario.

The evidence before the Board included a tape recording of a company meeting during which the president of the respondent company threatened workers with lay-offs, shut-downs and a general lack of job security as a result of the workers engaging in lawful union activities. Shortly after those meetings, the company discharged three workers who had signed others into the union. The company alleged that these union supporters were terminated because they were soliciting for the union on company premises during working hours. The company cited its general plant rules contained in an "Employees Handbook" to justify its actions. Rule 25 of the Handbook prohibited soliciting for any purpose whatsoever on company premises.

The Board referred to the recent *Adams Mines* decision, and other Board jurisprudence and held that the rule was presumptively invalid to the extent that it prohibited solicitation during non-working time. Since there was little or no evidence that the workers actively solicited membership during working hours, and since there was evidence of the company rule being applied in a discriminatory manner (in that an employees' association was freely permitted to solicit on company premises during working hours) the Board concluded that the dismissals were unlawful. The Board found that the company's motivation for discharging the three union organizers was based upon a desire to thwart the union's organizational campaign. The Board ordered that they be reinstated with compensation to the date that the company offered to reinstate them without prejudice to their claims before the Board. The Board held that the workers could and should have mitigated their losses by accepting the company's offer of reinstatement. The Board also heard evidence of a substantial number of lay-offs during the organizational campaign. The Board was satisfied that the company had legitimate business reasons for these lay-offs and that they were not caused by an anti-union animus, with the exception of the lay-off of a union organizer who was deprived of the usual bumping privileges arising out of his seniority after he testified before the Board in support of the union.

Finally, in considering whether the union should be certified without a vote pursuant to section 8 of the Act, the Board considered the substantial support enjoyed by the union (over 50%) and the seriousness of the unfair labour practices committed by the company. The Board found that the threats, intimidation and undue influence exerted by the president of the company at the "captive audience" meetings, the contemporaneous discharge of three union organizers, and the subsequent denial of bumping privileges to the union organizer who testified before the Board, created a situation in which the true wishes of the employees could not be ascertained in a representation vote. In addition to granting a certificate without a vote, the Board directed other remedial measures including union access to employee lists and company bulletin boards. *Wilco-Canada Inc.* [1983] OLRB Rep. June 989.

Employer required to proceed first in section 8 cases where a certification application is consolidated with an unfair labour practice complaint

This was a consolidated action involving an application for certification pursuant to section 8 of the Act, and a complaint pursuant to section 89 of the Act. The two actions arose out of similar facts, i.e. the termination of eleven employees, and threats made to employees.

Prior Board practice in cases where application was made under section 8 was to require the union to proceed first. However, relying on the reasoning in *Domtar Packaging*, the Board held that it was justified in requiring the employer to proceed first in the circumstances. Due to the nature of the allegations, the legal burden is on the employer by virtue of section 89(5). The Board stated that the bulk of the evidence in the consolidated case would be in respect of the section 89 allegations and that these allegations are the central focus of the matter. In the circumstances, the Board found no reason to depart from the reasoning in *Domtar. Canadiana Pizza Co. Ltd.*, |1983| OLRB Rep. June 872.

The right of an employer to send refusers home without pay pending a ministry inspection

This complaint under the *Occupational Health and Safety Act* arose out of a refusal to work by certain employees of the company on the grounds that the presence of gasoline fumes in the work area posed a health hazard. The company engaged independent engineers to conduct tests. The company repeatedly attempted to convince the refusing employees to return to work on the basis that the plant was determined by the engineers to be safe. One complainant, Mr. Arnold, was told repeatedly that if he did not get back to work his pay would be stopped. When the employees continued their refusal, the company shut-down operations and sent the employees home pending an inspection by ministry inspectors. The inspectors conducted "sniff tests" and determined that certain corrective action was required. The employees did not receive their regular pay from the time they were sent home, although those who qualified received s.u.b. payments under the collective agreement.

The complainants, while admitting that no alternate work was available, argued that nevertheless, the employer's right to give "other directions" could never include the right to send refusing employees home without pay while the ministry investigation was pending. Secondly, it was argued that the employer's conduct interfered with the complainants' right to be present for the ministry inspection and that they were penalized to the extent that they did not participate and were denied the pay they would have received if they participated in the inspection.

The Board disagreed. Recognizing that sending employees home without pay was a common employer response to a lack of work situation, the Board stated that if the legislature intended to prohibit such a response, it would have done so expressly. The words "other directions" in section 23(10)(b) permit an employer, in the proper circumstances, to give a full range of directions. This includes the laying off of employees for refusing to work for whom no alternate work is available, as long as the lay-off is not directed in a fashion which amounts to a penalty or discipline. The Board, in the circumstances of this case held that the employer in sending the complainants home was resorting to the only practical response available and did not act out of a desire to punish the refusers. The Board also found that the refusers were not sent home because they were acting in compliance of the Act, and therefore found it unnecessary to decide whether the lay-off denied the refusers an opportunity for earnings that would otherwise have been present during the investigation through participation in it. The Board also found it unnecessary, on the facts before it, to decide whether refusers are entitled to be paid for the period of investigation and whether failure to pay is in itself a violation of section 24.

However, the Board, noting that the threat to Mr. Arnold that his pay will be stopped if he did not get back to work occurred during the first-tier investigation stage, at which point the employer is not given a right to assign alternate work or give other directions to a refuser, held that directions of this nature amounted to unlawful intimidation contrary to section 24(1)(d). The Board stated that this type of direction negates the right of refusal in section 23. As a remedy for the contravention found in regard to Mr. Arnold, the Board directed the posting and circulation among managers of a Notice to Employees prescribed by the decision. *International Harvester Company of Canada*, |1983| OLRB Rep. June 898.

Union required to permit participation of non-members in strike votes

The union called a meeting with the intention of conducting a strike vote. Of a bargaining unit of 30 employees, 22 attended at the meeting. However, the employees were told that they could not enter the meeting room and participate in the strike vote unless they joined the union. All of the employees refused to attend. The union had also not held any membership meetings to report to the employees with respect to its bargaining committee's activities. The employees filed a complaint against the trade union, alleging breaches of sections 68 and 72.

The Board held that the union had violated section 72(5) by not permitting the employees to participate in the strike vote and section 68 by not convening any meetings of the employees to review the bargaining.

The Board ordered the union to conduct at least 4 meetings per year; to provide copies and an explanation of the new collective agreement, if there is one, to the employees; to ensure all strike votes in the future are conducted by secret ballot available to all bargaining unit employees; and to mail a notice to all employees in the usual form. *Manor Cleaners Ltd.* |1983| OLRB Rep. June 929.

Receivers not successor employers - Not responsible for breaches of collective agreement by insolvent employer

The applicant union held bargaining rights for the employees of Windsor Packing and a collective agreement was in force. Windsor Packing defaulted on its secured obligations to the National Bank and the Federal Business Development Bank. The banks privately appointed Price Waterhouse and Touche, Ross Limited as receiver/managers. Both receivers decided that the business could not be sold as a going concern and opted to realize on the banks' securities to the extent that they could against the assets of the insolvent company. Price Waterhouse took control of some 23 employees, who were retained in diminishing numbers until the plant and premises were entirely mothballed as of the end of October. Price Waterhouse did not observe the terms of the collective agreement either in the selection of which employees would be retained, or in any of their terms and conditions of employment or lay-off, save that for convenience, it continued to pay them the rates of wages they had been getting under the collective agreement. It did not deduct or remit union dues.

On these facts the union contended that, when the banks and their receivers took over the assets and undertaking of Windsor Packing, along with effective control of the employees, they became successor employers within the meaning of section 63 of the *Labour Relations Act*. The union alleged that as successor employers, the respondents were obliged to remit union dues which were owing from the insolvent employer, and that the failure to do so was a breach of section 64 of the Act. It further contended that even if the respondents were found not to be successor employer, nevertheless they had breached section 64 by their failure to remit the amount of dues owing from Windsor Packing, either out of the assets of the insolvent or of the respondents' own assets.

The Board characterized the union's claim as a request to turn section 63 into "a device for collecting the employers uncollectable collective agreement debts from its solvent creditors." The Board held that, despite the intervention of the receivers, the legal interest of the insolvent company never ceased to exist. The receivers were simply agents of the insolvent company and were acting for the benefit of the company in pursuance of its written authorization in the debenture. Therefore, the Board dismissed the application under section 63.

Dealing with the unfair labour practice aspect of the matter, the Board rejected the proposition that on the private appointment of a receiver, the collective bargaining rights of a union come to an end. The Board found the receiver to be a "person acting on behalf of an employer" within the meaning of section 64. In that capacity, it had interfered with the representation of employees by, and the administration of, the trade union by totally ignoring the union's rights after it took possession of the operation. Therefore, the Board found the respondents, as persons acting on behalf of an employer, had violated section 64, and was liable independently of the liability of the principal insolvent company.

As for the union dues not remitted prior to the receivership, the Board found no evidence that the receivers had directly or indirectly appropriated for itself or for the Bank any union dues or trust funds owing to the union. Therefore the remedy was limited to such dues as it failed to deduct and remit for the priod of time during which it became the manager of the insolvent company. *Price Waterhouse Ltd. et al,* |1983| OLRB Rep. June 944.

Open period for termination application postponed by Inflation Restraint Act

The applicant employee sought to terminate the respondent trade union's bargaining rights. Section 57(2) of the *Labour Relations Act* provides *inter alia*, that such applications may be brought "only after the commencement of the last two months of" the collective agreement's operation. While the application was in fact filled within the two month period, the respondent trade union argued that the provisions of the *Inflation Restraint Act, 1982*, otherwise known as Bill 179, had the effect of extending the terms of the collective agreement by another year, thereby rendering the termination application untimely.

The Board referred to its decision in *Broadway Manor Nursing Home*, |1983| OLRB Rep. Jan. 26, which involved an application by one trade union to be certified with the effect of displacing an incumbent trade union. In that case, the Board held that the application, although timely on a simple reading of the collective agreement, was untimely as a result of the provisions of Bill 179. By its terms, Bill 179 applies "notwithstanding any other Act", and this includes the *Labour Relations Act.* Bill 179 extends the operation of a collective agreement, with the effect of postponing the time in which a displacement application can be made, since the last two months of the existing collective agreement commence a year later than the face of the agreement would indicate.

The applicant attempted to distinguish *Broadway Manor* on the basis that that case was a displacement application, pursuant to the certification provisions in section 5 of the *Labour Relations Act*. The present case involved a section 57(2) termination application. While Bill 179 may alter the "open period" in a displacement situation, it did not do so in a termination application, it was argued. The applicant contended that Bill 179 is intended to restrain compensation, and the motivation of employees seeking to adopt the "non-union" option may have nothing to do with a desire for increased compensation. In the applicant's submission, the motivation for the application is key.

The Board rejected the applicant's argument, and chose to follow the ***Broadway Manor*** decision. The question of motivation can just as easily be made with respect to displacement applications. The applicant was effectively asking the Board to overrule ***Broadway Manor***, but the Board stated it had no reason to do so. The ***Broadway Manor*** decision did not turn on any questions of motivation, but rather on a careful analysis of the language of the two statutes, and the relationship of the statutory scheme for representation applications to the temporary impact of Bill 179 on the scheme for collective bargaining as a whole.

It was also argued that section 57(2)(6) of the Act, which pertains to termination applications, required the Board to distinguish this case from the displacement situation in *Broadway Manor*. Section 57(2)(c) contemplates the preservation of the inital "open period" where the collective agreement has been extended by the parties' default. The collective agreement between the employer and the respondent trade union provided for an expiry date, but extended itself from year to year in the event that neither party provides notice to the other party. It was argued that section 57(2)(c), as a result of the language in the collective agreement and the fact that this was a termination application, had the result of preserving the original "open period".

The Board rejected the argument. Section 57(2)(c) preserves the original "open period" only if the operation of a collective agreement is extended by the *default of the parties*; it does not apply to a situation where the parties' normal ability to bargain has, in advance, been postponed by statute. The Board observed that it was in no position to "stretch" the meaning of section 57(2)(c), as requested by counsel, nor even if the Board could "stretch" its interpretation of the Act would it be desirable to do so in order to accommodate termination applications.

Finally, it was argued that Bill 179, to the extent it ousts the normal procedures set out in the *Labour Relations Act*, violates the freedom of association provision provided for in section 2(d) of the *Charter of Rights*. This argument was rejected in *Broadway Manor*, and the Board in this case reiterated the fact that the Act already places what have been considered to be necessary restraints on the right of access to changes in representation, particularly with respect to the timing of such access. In the Board's view, Bill 179's impact on these already-existing restrictions is not so fundamental as to bring the Act into conflict with the Charter.

The Board therefore dismissed the application for termination as untimely, since the application was filed before the "open period" as re-defined by Bill 179. *Salvation Army House of Concord*, [1983] OLRB Rep. July 1203.

Privately appointed receiver and debenture holders not successor employers

In this successor rights case, the corporate owner of a nursing home ("the original owner") defaulted on a debenture held by one of its creditors ("the debenture holder"). As a result, a receiver and manager ("the receiver") was privately appointed to operate the original owner's business. A few days later the receiver was also appointed by the court as receiver and manager of the original owner's business. It was not until almost a year later that the nursing home business was sold to another corporation ("the new owner"). The applicant trade union had bargaining rights in respect of the original owner's nursing home, and the new owner voluntarily agreed to inherit its bargaining obligations as the successor employer. The trade union, however, further contended that both the receiver and the debenture holder were also successor employers bound by the original owner's bargaining obligations and collective agreement. The issue, therefore, was whether the receiver and the debenture holder of a defaulting owner can be considered successor employers of the owner pursuant to section 63 of the *Labour Relations Act*.

When the receiver was appointed on behalf of the debenture holder, the original owner's management was replaced. However, the original owner's board of directors continued to exist. The employees of the original owner were informed they would be paid but this was not a personal undertaking from the receiver. Once the necessary initial controls were in place, the receiver felt that the original owner did not require the full-time presence of anyone from the receiver's firm. At no time did title to any of the original owner's property vest in the debenture holder. None of the debenture holder's employees were present at the nursing home during the period of receivership. The debenture contained the usual provisions that in exercising any powers, the receiver shall act as the agent for the original owner.

In considering whether there had been a sale of a business under section 63 of the Act, the Board concluded that the consequences upon labour relations flowing from a court-appointed receiver are no different than those which result from the private appointment of a receiver. In either case, the same factors ought to be considered. Any distinction between the two types of receiver may be legitimate from a commercial law perspective, but not from a labour relations point of view.

The Board concluded that there had been no sale of a business from the orignal owner to the receiver or debenture holder pursuant to section 63. In the Board's view, the original owner remained the employer until the following year, when the new owner purchasd the nursing home upon the approval of the court. At common law, the appointment of a receiver and manager does not result in the dissolution of a company. A receiver and manager derives no title or estate from the court order which appointed him. He is merely an officer of the court responsible for collecting and dealing with the business or property covered by the terms of his appointment on behalf of the creditors.

The original owner continued to exist, but its ability to conduct its business had been drastically curtailed by its contractual obligations with the debenture holder by virtue of the debenture. The debenture holder was merely involving the safeguards provided for in the debenture in order to protect its financial interests. In order for section 63 to apply, there must be a disposition of a business, but this did not occur until the nursing home was purchased by the new owner. The receiver merely acted in its capacity as receiver and manager; and the debenture holder merely was protecting its financial interests. The Board observed that none of the original owner's assets were transferred to the debenture holder until after the sale of the business to the new owner. At all times relevant to this application, the original owner continued to exist with its control over the nursing home license. The collective agreement continued to be honoured by the receiver but on the original owner's behalf.

The union also argued that the receiver and the debenture holder ought to be liable for the amount owing from a retroactive interest arbitration award released during the period of the receivership. The retroactive award was for $100,000, and the receiver paid $40,000 to the employees to represent the proportion of the award which accrued during the receivership. The union contended that the receiver and the debenture holder ought to be liable for the entire amount, since the two parties had benefited commercially from their respective position. The Board described the principle put forth by the union as the "well-lined pocket approach". The Board rejected this approach. While expressing sympathy with the employees seeking to receive back wages owing to them, the Board stated that it makes no sense to find liabilty in an entity merely because it benefited in commercial relations with the employer of the employees. While it may be true that a lender of money has benefited from the labours of the employees, it may also be true that the money supplied has helped to create jobs, financial expansion and supplied liquidity during problems in cash flow and paid wages to the employees. There are clearly potential benefits on both sides of the relationship. The union's application against the receiver and debenture holder was therefore dismissed. *Price Waterhouse*, |1983| OLRB Rep. July 1184.

Board not rescinding collective agreement entered into on basis of mutual mistake

The Minister of Labour sought the Board's opinion, pursuant to section 107 of the *Labour Relations Act*, as to whether he had the authority to appoint a conciliation officer to assist the parties in agreeing to a collective agreement. The issue was whether a collective agreement was already in existence between the employer and the trade union, thereby making the appointment of a conciliation officer untimely.

The parties had earlier agreed to a Memorandum of Settlement, subject only to ratification by the union membership. The Board found as a fact that the parties had honestly and sincerely misunderstood one another in what had been agreed to with respect to the inclusion of a Cost of Living Allowance (COLA) clause in the new collective agreement. The expired agreement contained such a clause. It was the practice of the parties in past negotiations to make special reference to expired clauses only if there was a proposal to amend the particular clause. As the COLA clause was not specifically repealed by the Memorandum of Settlement, the trade union argued that the clause remained in effect. On the other hand, the employer had made clear at the bargaining table that any COLA entitlement would have to be fought for by the union at negotiations. Despite this disagreement as to whether the Memorandum of Settlement contained full COLA entitlement for employees, the trade union proceeded to have its membership ratify the new collective agreement based upon the Memorandum. The employer purported to withdraw its offer upon which the Memorandum was based prior to the union ratification meeting.

The employer maintained that no collective agreement was in existence. The Board considered this argument in two ways. First, was there a mutual mistake that had the effect of rendering the new collective agreement void? Alternatively, did the employer's purported withdrawal of its offer prior to union ratification have the effect of a collective agreement never coming into existence?

On the first point, the Board considered the jurisprudence with respect to mutual mistake in some detail. "Mutual mistake" must be distinguished from "common mistake". In common mistake, both parties make the same error. They are fully aware of the intention of the other, but both are mistaken about some underlying and fundamental fact. In mutual mistake, the parties mistunderstood each other and are at cross-purposes, as is the situation in this case. In such a situation, courts generally will not rescind a contract merely because a party understands the words to mean something different than they objectively connote. Rescission will only occur if the mistake of one party is known to the other party; if there is such ambiguity that a reasonable person could not draw any relevant inference concerning the terms of the contract which is alleged to have come into existence; or if the natural mistake goes to the heart of the entire contract or affects a matter that is fundamental to the contract as a whole.

The reluctance of the law to rescind contracts on grounds of mutual mistake is especially important in respect of collective agreements. Parties should not be able to resist the terms and conditions agreed to in difficult bargaining sessions merely because they misunderstood the words finally agreed upon. The intention of parties to a collective agreement must be considered objectively. So long as the parties have agreed to words which can be objectively interpreted, a contract is in existence. The doctrine of mutual mistake is a common law rule, while collective agreements exist pursuant to the *Labour Relations Act*. The Board, in adopting the words of an arbitrator, concluded that the doctrine is inapplicable for that reason. The Act requires disputes as to interpretations of collective agreements to be resolved through arbitration, and not by rescission, which would re-open the right to strike and lock out. The Board therefore rejected the argument that the collective agreement was void due to the parties' mutual mistake.

The Board proceeded to consider whether the employer's withdrawal of its offer prior to union ratification meant that no collective agreement was in existence. Normally, the withdrawal of a written offer prior to union ratification would be a breach of the employer's duty to bargain in good faith. But in this case, the employer purported to withdraw its offer upon learning that the Memorandum of Settlement might not accurately reflect the terms of settlement which it reasonably contemplated. The Board therefore concluded that the withdrawal of the employer's offer was legitimate. As the offer was withdrawn, the ratification was ineffective. The Board held that no collective agreement was in operation. In the result, the Board concluded that the Minister of Labour had the authority to appoint a conciliation officer. *Sperry Vickers*, [1983] OLRB Rep. July 1208.

Inferior check-off clause cannot be forced to impasse – bad faith bargaining found

During negotiations for a first collective agreement, the union requested that the employer (which had been found in earlier proceedings to have contravened section 15 by refusing to bargain with the union concerning monetary items) provide information concerning its existing job classifications and wage rates. Despite the employer's illegal refusal to provide that information, the union, much to the surprise of the employer, accepted the employer's proposals relating to a number of contract items. Later that day, the union through the mediator, presented the employer with a comprehensive proposal, including the language which had previously been agreed upon by the parties. The employer responded by reneging on some of the agreed upon language and purporting to impose, as a condition precedent to entering into a collective agreement with the union, a requirement that the employer's final offer be presented to the union membership for ratification. The employer also proposed in its final offer a dues check-off provision which was less than that to which a union is entitled under section 43. After arranging to have the mediator deliver this final offer to the union, together with an announcement of the employer's intention to apply to the Minister for a section 40 final offer vote, the employer's representatives left the premises without giving the union any opportunity to discuss that offer with them, or to accept or otherwise respond to it.

The union subsequently complained to the Board, alleging that the employer's conduct was in contravention of sections 15, 43, and 89(7) of the Act. The employer requested the Minister to direct a final offer vote among the employees pursuant to section 40 of the Act. The union took the position that no vote should be conducted until its unfair labour practice complaint, which included an allegation that the request for a final offer vote was illegal, had been heard and decided by the Board. The employer on the other hand contended that the Board should await the outcome of the final offer vote before proceeding with the union's complaint and raised that, and other matters, as a basis for requesting an adjournment of the proceedings. The request was denied by the Board.

The Board held that while it may be permissible for an employer to propose a dues check-off provision less encompassing than that contemplated by section 43, that is not a matter that can be pressed to impasse. The Board held that by requesting a final offer vote on the exclusion of "part-timers" and "students" from the check-off clause, (notwithstanding their inclusion in the bargaining unit for which the union had been certified), the employer contravened section

15 of the Act. A violation of the duty to bargain in good faith was also found in the employer's reneging on earlier agreed upon language. While reneging on an earlier offer is not a *per se* violation, in the absence any explanation for the reneging in the particular circumstances, the Board found a violation. The Board noted that it is well established in Board jurisprudence that an employer cannot legally impose a condition that a proposal for a collective agreement be ratified by employees. The Board was satisfied on the facts that the employer had imposed that condition in order to avoid entering into a collective agreement, contrary to section 15 of the Act.

The Board also stated that while section 40 permits an employer to have its final offer voted upon by bargaining unit employees, that provision cannot be used as a means of avoiding the duty to bargain in good faith. Thus, the employer contravened that duty in requesting a final offer vote without giving the union an opportunity to discuss or accept the offer. By way of remedy, the Board directed, *inter alia*, that the employer prepare, execute and forward to the union a collective agreement embodying all of the language which had been agreed upon and all of the lawful proposals in the employer's final offer (which proposals the union had indicated to the Board were acceptable to it). In view of the Board's finding that the request for a final offer vote was itself, in the circumstances of this case, a contravention of the Act, the Board held that the employer was not entitled to have such a vote taken. *Northwest Merchants Ltd.* |1983| OLRB Rep. July 1138.

Employer's unlawful conduct causes Board to direct new termination vote

The employer had a unionized operation (North Queen) and a non-union operation (Hannah). The union succeeded in negotiating a first collective agreement at North Queen only after a bitter six month long strike. The agreement gave the employees at North Queen a 13% wage increase. Shortly thereafter, the employer gave its non-union employees at Hannah a 14% wage increase. The non-union workers were also granted a sick-pay plan which was vastly superior to that contained in the collective agreement. The employer hired some 100 "temporary employees" from an employment agency to do bargaining unit work at North Queen. Subsequent to the filing of a grievance by the union this practice was terminated and the union was compensated for unpaid union dues. Subsequent to the signing of the collective agreement the employer, rather than recall striking employees, continued the sub-contracting of unit work, a practice that had commenced during the strike. Further to an unfair labour practice complaint filed by the union, a settlement was reached whereby the employer agreed to cease contracting out and to recall the employees in the unit. However, the practice of contracting out was continued subsequent to the settlement. Prior to the date of the termination vote the employer transferred some 60 non-union employees from Hannah to North Queen. While they were working side-by-side with the unionized employees at North Queen, they continued to receive their non-union rates, which were higher than those received by the unionized employees. In negotiations for the renewal of the contract, the employer's best offer was an 8% increase to employees at North Queen, which would still have given the unionized employees a wage rate lower than that paid to non-union employees at Hannah.

On the foregoing facts, which were substantially undisputed, the union submitted that the employer had engaged in a deliberate pattern of discrimination calculated to convey the message that within the employer's operation. unionized employees would be financially penalized, while those who choose not to be unionized would be rewarded. It was contended that this affected the ability of employees to vote freely at the termination vote held, and that therefore the Board should not count nor rely on the ballots.

The Board stated that while there is no absolute requirement that an employer's union and non-union employees be treated equally, where no valid reasons are forthcoming to explain the preferential treatment, the Board must look carefully at the whole of the evidence. Reviewing the evidence, the Board held that the facts established by the union caused the Board to draw an adverse inference against the employer, so as to require the employer to come forward with some explanation for its decision.

The Board concluded that the preferential treatment under the circumstances was unlawful and further that the proposal of a wage rate to its unionized employees, which was lower than that paid to its non-union employees, in the absence of any economic justification, constituted bad faith bargaining. The Board stated that the pattern of conduct of the employer "compellingly suggests anti-union motivation as the most probable explanation for its actions". Dealing with the continuation of the contracting-out, the Board found that by continuing to contract out work, the employer had breached the settlement agreement and by extension violated the freeze provisions under section 79. The Board's remedial order included a direction that the respondent employer table forthwith a wage offer which was not discriminatory towards employees, the terms of which were to be retroactive to compensate the discriminatory differential which was in effect from the time of the unlawful conduct. The employer was also required to cease and desist from transferring non-union employees from Hannah to North Queen, unless employees from both locations were paid equal rates or other rates consented to by the union. The Board directed that the ballots cast in the termination vote be destroyed and that the vote be reconducted. *Irwin Toy Limited* [1983] OLRB Rep. July 1064.

Employees entitled to make certain unfair labour practice complaints on their own

A group of 16 employees filed a section 89 complaint against the respondent employer, alleging violations of sections 3, 64, 66, 70 and 80 of the *Labour Relations Act*. The complainants were all of the employees in a bargaining unit represented by a trade union. The trade union declined to file a complaint against the employer involving alleged unfair labour practices. The employees therefore proceeded to file their own complaint. Further, the applicant employees declined to file a concurrent complaint against their union alleging that the trade union had breached its duty of fair representation.

The respondent employer objected to the complaint on two preliminary points. First, the employer argued that individual employees did not have the status to bring such complaints. Without a concurrent complaint against the union, the employees had no right to bring a complaint against the employer. Second, it was submitted that the Board should defer to arbitration, since the essence of the complaint involved an alleged breach of the collective agreement.

The Board rejected both of the employer's objections. On the issue of status of individual employees to bring complaints against their employer, the Board considered earlier Board jurisprudence. While a number of the provision in the *Labour Relations Act* (such as section 64) extend legal protection to trade union *per se*, section 66 of the Act provides protection to individual employees. Section 66(a) forbids discrimination against a "person" for trade union activities. Thus, while individual employees do not have status to bring complaints under provisions such as section 64, they may proceed with the complaint insofar as it pertains to section 66(a). The Board noted that nothing in the Act stipulates that a complaint alleging a breach of section 66(a) may only be brought by a trade union. If the bargaining unit in question was not represented by a trade union, the employees would presumably have status to bring a section 66(a) complaint; the existence of a certified bargaining agent should not make a difference, in the Board's view.

The Board also rejected the contention that as a prerequisite to proceeding against the employer, the employees should be required to file a complaint against the trade union for failing to represent them fairly. The Board stated that the employees could have a number of legitimate reasons for not proceeding against the union. The employees may perceive their differences of opinion with the union as being an honest one, and may have concluded that the union had not breached its duty of fair representation to the extent required for a complaint to succeed. The Board should not encourage vexatious complaints. Requiring the employees to file a complaint against the union would run counter to the aims of the Act, as it would require an employee to proceed against his union simply and only to enforce his individual rights, established by the Act, vis-à-vis his employer.

Finally, the Board refused to defer to the arbitration process pursuant to the existing collective agreement. While the complainants maintained that the employer had violated the collective agreement, the essence of the employees' complaint was an alleged breach of the Act. The employees maintained that the employer was acting with anti-union animus and attempting to destroy the union through the manner in which it was assigned work. Further, the collective agreement does not contain a clause prohibiting discrimination against employees for union activity. In the result, the employees were permitted to proceed with the complaint. *Dufferin Aggregates*, |1983| OLRB Rep. July 1031.

Reverse onus not contrary to Charter of Rights

In this section 89 unfair labour practice complaint, the respondent employer argued that section 89(5) of the *Labour Relations Act*, together with the administrative practices developed by the Board in relation thereto, was in conflict with sections 2(b), 7, 11(c) and (d) of the *Charter of Rights* and therefore invalid. The argument was made as a preliminary objection, by which the employer objected to being required to present its case first. The employer's constitutional argument was essentially two-fold. First, the employer argued that section 2(b) of the Charter guarantees "freedom of thought, belief, and opinion and expression", yet the Board considers whether an employer holds certain beliefs or expresses certain opinions in determining whether the act was contravened. Second, section 1(d) of the Charter provides the right "to be presumed innocent until proven guilty". The reverse onus provision in section 89(5) of the Act, it was argued, is in conflict with the Charter. In the employer's submission, the Board acts unconstitutionally in failing to require trade unions complaining under section 89 to prove a *prima facie* case. Requiring the employer to call evidence in the absence of a *prima facie* case runs contrary, it was argued, to the presumption of innocence provided for in the Charter.

In an oral decision, the Board rejected the constitutional challenge to section 89. The Board noted that the issue was decisively dealt with in the recent case of *The Constellation Hotel Corporation Ltd*. The Board briefly referred to the fact that the procedural requirement for the employer to proceed first was due to the fact that the employer is the party in most complete possession of the facts. The reverse onus rule is a matter of evidence and procedure and raises no presumption of guilt. The burden of proof on the employer is only triggered where there is no evidence before the Board or where the evidence before the Board is equally balanced. The Board stated that the employer's arguments concerning sections 2(b) and 7 of the Charter did not detract from its initial ruling. The employer, upon hearing the Board's oral decision, requested an ajournment so as to enable it to apply to the Courts pursuant to section 24(1) of the Charter. The request was denied. *Knob Hill Farms Limited*, |1983| OLRB Rep. July 1087.

Non-wage aspects of hospital arbitration award valid in face of Inflation Restraint Act

The applicant trade union was certified as bargaining agent in November of 1981. Collective bargaining with respondent nursing home commenced, but the parties were unable to agree to a first collective agreement. In August of 1982 a board of arbitration was appointed pursuant to the *Hospital Labour Disputes Arbitration Act* ("HLDAA") to resolve all outstanding issues in dispute. In September of 1982 the *Inflation Restraint Act* ("I.R.A.") was given first reading in the Ontario Legislature. The arbitration board was scheduled to commence hearings in October in 1982. However, the nursing home requested an adjournment, in view of the possible passage of the I.R.A. The board of arbitration refused, and proceeded to hear the interest dispute. Repeated efforts were made to elicit the nursing home's participation, but without success. In November of 1982, the arbitration board's award came down. The *Inflation Restraint Act* was proclaimed on December 15, 1982, retroactive to September 21, 1982.

The nursing home refused to sign the collective agreement, which purported to cover the period from November 18, 1981 to November 17, 1983. Furthermore, the nursing home refused to abide by the terms of the award, resulting in a number of employee grievances. The nursing home failed to entertain the grievances, refusing to appoint a nominee to a grievance arbitration board.

The union asserted that the home violated the *Labour Relations Act*, by bargaining in bad faith (contrary to section 15,) and by refusing to abide by a binding collective agreement (contrary to section 50). The home contended that the provisions of the I.R.A. rendered the collective agreement a nullity. The issue was what effect the I.R.A. had on a first collective agreement awarded by an arbitration board prior to the passage of I.R.A. but within the period of its retrospective operation.

The award's period of application coincided with the years covered by the 9% and 5% maximum pay increases allowed by the I.R.A. The Board referred to the fact that although earlier Board decisions had considered the effect of the I.R.A., none had considered the I.R.A. in light of a first collective agreement. However, O. Reg. 57/83, passed pursuant to the I.R.A., makes clear that the 9% and 5% limits apply to first collective agreements. The award handed down by the arbitration board allowed wage increases exceeding 9% and 5% respectively. Wage levels – referred to as "compensation plans" in the I.R.A. – must comply with the 9% and 5% limits. The Board therefore concluded that the "compensation plan" contained in the arbitration award was not binding on the nursing home.

The next issue to consider was whether the non-wage provisions of the awarded collective agreement were binding. The Board held that these provisions were valid. Nothing in the I.R.A. or O. Reg. 57/83 operated to suspend the arbitration procedure set up in the HDLAA to achieve a first collective agreement. On the facts of the instant case, the arbitration board's procedures were underway prior to the enactment of the I.R.A., and it had jurisdiction to continue, even in the face of impending inflation restraint legislation. Section 16 of the I.R.A. speaks of the invalidity of compensation plans which do not comply with that statute. The fact that only "compensation plans", and not collective agreements in full, are invalidated shows that compensation plans are severable from the remaining provisions of a collective agreement. In light of these observations, the Board concluded that the collective agreement awarded by the arbitration board was valid, except for the compensation plan therein.

Based on this conclusion, the Board ordered the nursing home to abide by the collective agreement, save its compensation plan pursuant to section 50 of the *Labour Relations Act*. Since the collective agreement was in force, the duty of good faith bargaining was not an issue. *St. Raphael's Nursing Home*, [1980] OLRB Rep. Aug. 1370.

Union agreement to give preference to disabled employees not breach of fair representation duty

The complainant employee alleged that his trade union violated its duty of fair representation, contrary to section 68 of the *Labour Relations Act*. The union and the employer had an arrangement for the past 25 years, whereby disabled employees would be given preferences for certain positions for which they were capable of filling, in order to avoid their unemployment. The arrangement was a deviation from the terms of the collective agreement, which required that promotions be awarded on the basis of an employee's seniority and ability. The complainant requested that the union file a policy grievance to oppose the arrangement. Reluctantly, the union filed the grievance, but after thorough discussion and with membership approval the grievance was dropped before the issue was brought to arbitration.

The Board rejected the contention that the trade union violated its duty of fair representation. The complainant's grievance was entertained, discussed and eventually dropped by the membership. There was nothing cursory, perfunctory or improper in the way that the grievance was handled.

The Board also concluded that the union's agreement with employer to waive suitable job openings in favour of disabled workers was not illegal. It was a perfectly reasonable and laudable effort to recognize and accommodate the needs of disadvantaged individuals. This preference for disabled workers was not the kind of invidious "discrimination" to which section 68 of the Act was directed. The Board noted that it might have been wiser for the employer and the union to have concluded a formal letter of understanding between themselves agreeing to assist disabled workers. But it was neither necessary nor even desirable, in the Board's view, to reduce every aspect of a collective bargaining relationship to writing. *Falconbridge Limited* [1983] OLRB Rep. Aug. 1303.

Uncomfortableness due to allergy condition not reasonable ground to refuse work

The complainant argued that he was terminated by his employer contrary to the provision of the *Occupational Health and Safety Act*. Section 23(3) of that statute permits an employee to refuse to perform work "where he has reason to believe that ... [it] is likely to endanger himself ...". Section 24(1) of the statute forbids an employer from dismissing or disciplining an employee for carrying out his rights provided by the statute. Section 14(2)(g) imposed a duty on employers to "take every precaution reasonable in the circumstances for the protection of a worker."

The complainant was required by his employer to perform certain work. The complainant refused, because if he did the work he believed he would experience certain allergic "cold-like" symptoms. It was clear that although the complainant might have experienced these reactions, such allergic responses to the type of work required were unusual. The complainant once asked for a face mask, but received no response. He never pursued the request again, although he knew he was about to be terminated. Finally, because the complainant refused to carry out the work requested, his employment was terminated.

The Board was asked to consider whether, assuming all of the facts as alleged by the complainant were true, the complainant had made out a *prima facie* case. The Board concluded that the facts as alleged revealed no *prima facie* case. While the type of work which the complainant was required to do might have caused discomfort and inconvenience, this did not constitute "a danger". Generally, the evidence showed that the work place did not present a health hazard; the complainant's reactions were exceptional. Further, the Board noted that the complainant did little to pursue a means to put himself in a position to do the work in question. Since the complainant failed to bring himself within the provision of section 23(3) of the statute, his employment was not protected by section 24. He was lawfully discharged because he could not or would not perform his full range of duties.

Nor did the Board find a violation of section 14(2)(g) of the statute. Assuming that the Board had jurisdiction to consider such an alleged statutory violation, extensive investigations and reports from the Industrial Health and Safety Branch of the Ministry of Labour made clear that no safety hazards existed at the work place. The complaint was dismissed. *Wheeler Metal Products Ltd.*, |1983| OLRB Rep. Aug. 1386.

Onus of establishing voluntariness in a decertification petition not discharged

The Board was dealing with a timely termination application which was supported by a petition signed by more than 45% of the employees in the bargaining unit. The Board referred to the Ontario Court of Appeal decision of *R v. K-Mart Canada Limited*, 82 CLLC 14, 1875, in which the intervener in the present case was fined $100,000 following its conviction for a "sophisticated conspiracy" designed to deny bargaining unit employees the right to freely associate and organize in accordance with their rights under the *Labour Relations Act*. After quoting extensively from the decision, which set out the history of the intervener's unlawful conduct in attempting to undermine the respondent's attempt to represent the employees in the bargaining unit, the Board noted that after that decision, the intervener had been found to have breached sections 43, 64, 77 and 80 in various Board decisions. The Board indicated that while it is not appropriate to "visit the sins of an employer on its employees", a pattern of pervasive and notorious breaches of the Act is a factor which cannot be over-looked if the Board is to realistically assess the voluntariness of a petition.

Examining the facts in light of this background, the Board found that the applicants were allowed to move freely during working hours to bolster support for the termination application and that the applicant's activities in that regard could not have failed to have been viewed by other employees as having been engaged in with the approval of management. The Board further noted that some employees were led to believe that management was being made aware of their support for or opposition to the respondent. It was also shown that a security guard retained by the intervener was situated approximately 10 feet away from the plant gate where the employees' cars were being stopped by the applicant for the purpose of obtaining their signatures on the petition.

Having regard to the history of the intervener's unlawful conduct and circumstances surrounding the application, the Board was not satisfied that the signatures on the petition were obtained in a manner that "would permit employees to feel reasonably assured that management would not be made aware of which employees in the bargaining unit signed the petition and which of them did not." Consequently the application was dismissed. *K-Mart Canada Limited* |1983| OLRB Rep. Aug. 1338.

Intimidation and coercion in conduct of union elections not established

In this unfair labour practice complaint, the complainant was seeking to set aside the results of a union election for the position of business manager in which he was defeated by one of the co-respondents. The Board had earlier ruled that the only basis upon which it had jursidiction to intervene was a violation of section 70. Evidence placed before the Board established that prior to the impugned election, the co-respondents had attempted to oust the complainant as business manager of the local charging that he had mismanaged union funds. Both of the individual co-respondents had sat on the trial board established under the local's constitution to hear the charge. The trial board imposed a fine and dismissed the complainant, but this decision was rolled back on intervention by the parent international. Subsequent internal political activity was characterized by "confusion and acrimony". The political atmosphere of the local became polarized into two distinct camps. Most members of the local were either supporters of the co-repondents or of the complainant. This confusion and ill-will crystallized in the eventual election battle that took place for the position of business manager between the complainant and one of the co-respondents. The complainant argued that the cumulative effect of incidents involving the respondents that took place up to and during the election, amounted to "intimidation and coercion" on the part of the respondents, and as such, represented a breach of section 70 of the *Labour Relations Act*. The events so alleged included, that on two separate occasions a co-respondent attempted to physically assault the complainant; that one of the co-respondents while chairing a membership meeting had a wrench in his desk drawer on stage; that supporters of the complainant were threatened with physical harm by supporters of the respondents at a membership meeting; that supporters of the complainant were threatened with loss of membership; and that at the time of the election, "watchers" (scrutineers) were not permitted to properly examine the counting of ballots by the election judges, all of whom were supporters of the co-respondents. The complainant alleged that the watchers were restrained in carrying out their function because they were intimidated.

The Board found no real attempt on the part of the respondents to assault the complainant, and in any event, that the alleged incidents were essentially unknown to the membership. Finally, and most importantly, there was no finding of intimidation of any of the "watchers" during the election.

In light of these findings, the Board found that the respondents did not interfere with the results of the election through intimidation or coercion. The Board emphasized that the *Labour Relations Act* was designed to regulate collective bargaining relationships and that it has no inherent supervisory jurisdiction over internal union affairs. The Board only has power to intervene in the internal affairs of trade unions in a section 70 complaint where "intimidation and coercion" have been established. "Intimidation and coercion" requires "actual physical or economic harm". The Board ruled that there was "no pattern of conduct" made out, which make it a reasonable likelihood that the watchers feared physical or economic harm if they disobeyed the directives of the judges. The complaint was dismissed. *Frank Manoni* [1983] OLRB Rep. Aug. 1344.

Voluntary agreement to expand existing bargaining unit - Onus under section 60 to show majority support

The Board dealt with an application by a union to be certified as bargaining agent for employees working at a nursing home that opened in Etobicoke in the spring of 1983. The respondent employer operated a number of nursing homes in centres around Ontario. An intervention was filed by another union contending that it already represented the employees of the Etobicoke home. The intervener's claim was based on an agreement entered into on April 22, 1983, whereby the respondent agreed to recognize the intervenor as the representative of the employees at the new home in exchange for wage concessions. Being a voluntary recognition agreement, it was subject to challenge under section 60. The Board reiterated that a union is not "entitled to represent the employees in the bargaining unit" unless a majority of them have demonstrated support for the union. The essential issue for the Board therefore, was to determine what unit was to be examined for the purposes of section 60. The choice was between one encompassing all of the employees who were covered by the master agreement between the intervener and the respondent or one that would include only those employees who worked at the new home: i.e., the group added on.

The Board distinguished among the creation of bargaining rights by certification, a fresh voluntary recognition, and an agreement to expand on an existing unit. In both the certification process and in the creation of a fresh unit by voluntary recognition, all members are assured of an opportunity of participating in the selection of a bargaining agent. This could not be achieved in a situation where there is an agreement to expand an existing unit, and the potential new members are outnumbered by those in the old unit. The Board also noted that employees who gain bargaining rights by certification or by fresh voluntary recognition are protected against the excess of majoritarianism by the considerations of "community of interest and self-determination", subject to a countervailing concern for consolidated bargaining structures. These safeguards are absent in the context of a recognition agreement that expands bargaining rights, if the "litmus test" is an overall majority.

The Board admitted that section 60(1) was designed for the "paradigm" fresh voluntary recognition and that it fits imperfectly to the situation in this case. However, given the fact that the processes of certification and fresh voluntary recognition involve varying degrees of employee participation, the Board felt that any ambiguity in the section should be resolved by ensuring employee participation. Therefore, the Board held that the word "bargaining unit" in section 60 must be read to mean that added on portion to an existing unit. Hence a voluntary recognition agreement is not valid unless a majority of the employees in the added on portion support the union.

The Board qualified this holding by stating that while an agreement to expand an existing unit will be struck down pursuant to section 60(1) of the Act if a majority of the present employees in the addition did not support it, the Board will nevertheless exercise its discretion under the section "to uphold an agreement entered into before there are any employees in an addition to an exisiting bargaining unit". The reason for this distinction is that in the former situation the union comes to the employees, whereas in the latter the employees come to the union.

The Board then proceeded to apply this interpretation of section 60(1) to the facts at hand. It found that most of the employees had been hired on to the staff of the Etobicoke home before the agreement was executed. As such, they were deemed "present employees". Therefore, since the onus that section 60(1) places on the intervener had not been discharged, it was not entitled to represent the workers at the new Etobicoke location. *Bestview Holdings Ltd.* [1983] OLRB Rep. Aug. 1250.

The Relevancy of Employer motive in section 64 cases

The complainant alleged that nine grievors dismissed during the course of a strike and whom the respondent refused to reinstate or to arbitrate their cases, were dealt with by the respondent contrary to the provisions of sections 3, 15, 64, 66 and 70 of the *Labour Relations Act*. Three of the grievors dismissed were members of the local executive. The dismissal of the grievors resulted from an incident that occurred in the parking lot of a restaurant near the respondent's struck premises in which two individuals who were to serve the respondent as strike replacements were assaulted, and a van used to transport the replacements damaged. In examining the facts, the Board found that only three of the grievors had actually participated in the physical assault of the replacements. Three other grievors had been present, but did not take part in the assault. Another had caused damage to the vehicle used to transport the strike replacements. Allegations that this grievor had threatened one of the replacements with a knife were not substantiated by the evidence. Finally, it was in fact found that the remaining two grievors were not present at the restaurant at the time of the assault.

On these facts the Board was asked to rule upon three essential questions. Firstly, did the dismissal of the nine grievors without proper investigation of the level of culpability of the individual involved and the subsequent refusal to submit to arbitration amount to violations of unfair labour practice sections of the *Labour Relations Act* and in particular sections 64, 66 and 70? Secondly, did the refusal of the respondent to submit the grievors' dismissals to arbitration constitute an independent violation of the statute amounting to a refusal to recognize the trade union as the bargaining agent of the grievors? Finally, in refusing to discuss the termination of the grievors, and in particular the termination of those grievors who had not been present at the incident that gave rise to the terminations in question, did the respondent breach the duty to bargain in good faith?

With regard to the latter two issues, the Board ruled that the respondent's conduct in this instance did not result in a breach of the duty to bargain in good faith, nor did it constitute a failure to recognize the complainant. In reviewing the unfair labour practice of the case, the Board was compelled to comment on the inter-relationship among those sections that pertain to the employer's actions in dismissing and refusing to arbitrate the dismissals. Specifically, the Board examined the "motive" requirement of sections 64, 66 and 70. The Board noted that sections 66, and 70, by their wording suggest that a motive or intention to carry out the specific prohibited activity is required. Section 64 addresses the effect of the employer's conduct, and does not specifically address the question of intent or motive. The problem remained for the Board, therefore to determine whether the motive of the employer in dismissing the grievors is a relevant criterion in finding whether section 64 has been breached. To say that section 64 required no proof of motive, the Board stated, would be to effectively read sections 66 and 70 out of the Act, as complainants would then only file under section 64. On the other hand, section 64 could not possibly require the complainant to prove intention in its fullest sense, for to do so would make the section redundant and would undermine the Board's flexibility in dealing with employer practices, that, while not solely motivated by anti-union animus, serve nevertheless to interfere with the complainant's protected activities.

The Board reviewed its own jurisprudence on the question of motive and how it relates to section 64. In particular, it examined the different approaches to the subject taken in *A.A.S. Telecommunications*, and *Skyline Hotels*, respectively. The former decision stated that the distinction between section 64 and the more specific sections were based upon the fact that section 64 did not require the complainant to prove anti-union animus in order to find illegal interference. However, conduct that only incidentally affects a trade union is not to be viewed as interference. This qualification led to distinctions between "legitimate" and "illegitimate" management initiatives. The latter decision, on the other hand, implied in section 64 a motive requirement although motive need not be established by direct evidence where the employer conduct is such that it may be "presumed to have intended the consequences of his acts". If such conduct occurs, the employee must establish a "credible business purpose" to justify its actions. In looking at the employer's justification, the Board would balance the injury to the interests of the complainant with this credible business purpose before inferring an improper motive.

The Board, while favouring the *Skyline* approach, expressed concern about limiting the flexibility that the legislature decreed in section 64. It therefor added that there are instances in which there could be no such inference of motive, but where there nevertheless may be a breach of that section. Those situations would be cases where an employer's sincere but mistaken belief led to the discharge of an employee who was participating in a protected activity. The Board found that situations such as occured in this case, (where people were dismissed while participating in lawful picketing activities) whether undertaken in good faith or not, would clearly interfere with the rights of the complainant and would therefore be seen as a breach of section 64. The dismissal of the two employees who were not present at the assault would clearly fit into this category. The Board ruled that their dismissal and the employer's refusal to submit to arbitration violated not only section 64 but sections 66 and 70 as well, and as such, directed reinstatement of the employees with full compensation with interest.

With regard to the three grievors who were present at the scene but did not participate in the incident, the Board found that they remained within the realm of lawful strike activity. Given the protracted nature of this particular labour conflict, and the methods used by the employer to take strike replacements into the plant, the Board held that their activity was a lawful extension of the original picket line and thus subject to the protection of section 64 and section 66. Those grievors were ordered reinstated for the employer's breach of sections 64, 66 and 70, but they were denied compensation because of their refusal to testify at the Board hearing. The same result was found for the grievor who had damaged the vehicle. Compensation was withheld from this grievor because the Board felt it could not condone such activity. Also, his reinstatement was made subject to an arrangement whereby the grievor would pay for the property that was damaged. The Board held that the decision to dismiss the three grievors involved in the assault and the subsequent refusal to arbitrate those dismissals showed no anti-union animus and was appropriate under the circumstances. The unfair labour practice complaints that stemmed from those dismissals and all remaining aspects of the complaint were dismissed. *International Wallcoverings*, |1983| OLRB Rep. Aug. 1316.

Monetary compensation awarded for breach of duty of fair referral

In an earlier decision, the Board found that the respondent trade union had violated its duty of fair referral to the complainant in a hiring hall situation, contrary to section 69 of the *Labour Relations Act*. The Board ordered that the complainant be compensated for his losses resulting from the union's violation of the Act. The parties, however, were unable to agree to an appropriate monetary sum as compensation. The Board was therefore required to determine the amount of compensation which the complainant was entitled to.

Before considering the issue of compensation, the Board was faced with a request from the complainant that the hearing be temporarily adjourned. The request was made on the second day of the compensation hearing, after the complainant dismissed his lawyer. The complainant claimed he needed time to retain and instruct a new lawyer. The union refused to consent to an adjournment.

The Board rejected the complainant's request for an adjournment. In doing so, the Board reiterated its general practice not to grant an adjournment unless it is agreed to by the parties, except in extraordinary circumstance. Extraordinary circumstances would generally include unforeseen events beyond the control of a party, such as illness or difficulties in travel due to severe weather. The Board said that it does not generally adjourn a hearing on the request of a party for time to seek legal counsel, particularly where the party had ample notice of the hearing and a reasonable time to retain and instruct counsel beforehand. In the instant case, the complainant had nine days between his disagreement with his former counsel and the resumption of the compensation hearing. He had ample time to attempt to instruct and retain counsel. Having in mind the prejudice which an indefinite adjournment could have on the trade union by perpetuating a divisive issue, the Board determined that fairness to both parties and concern for the labour relations process required that the matter be disposed of without undue delay.

The Board proposed to consider the issue of compensation. The complainant argued that he was entitled to over $40,000 in compensation. A large portion of this amount was calculated on the contention that his lower wage earnings in 1981, as a result of the section 69 violation, reduced the base calculation upon which his pension benefits were based. These pension benefits were granted to the complainant after the section 69 violation committed in 1981. The complainant contended that the lower base rate in 1981 caused by the breach, when extrapolated over a prospected 43 years of disability, would have the effect of reducing his pension benefits to the extent reflected in the $40,000 figure.

The Board rejected the complainant's formula for compensation. First, the formula did not allow for the possibilty that the complainant may have earned more in 1981 because of the length or nature of later hiring hall referrals which he did receive. Secondly, it was based on the assumption that he would live a certain number of years and would collect a pension for all of that time. But in the Board's view, the correct approach to that head of compensation would be to capitalize any projected loss to its present day value, by an actuarial calculation. Thirdly, it was not clear that the Worker's Compensation Board, which granted the complainant the pension did not assess the complainant's pension entitlement by reference to the average earnings of a person in his position, rather than by his actual earnings for 1981. Alternatively, it was open to the Workers' Compensation Board to recalculate the pension benefits in light of the finding that the complainant's 1981 earnings were diminished by the union's breaches of the *Labour Relations Act*.

The trade union contended that the complainant was entitled to no compensation. Essentially, the union argued that the complainant's losses should be based on the average earnings of some selected employees who did the work the complainant may have done had section 69 not been violated. The union then proceeded to deduct a number of sums from the total, such as unemployment insurance benefits received by the complainant.

The Board rejected the union's approach as well. In the Board's view, comparing the complainant to other union members on a selective basis leaves much uncertainty. Determining the amount that an employee would have earned, but for the wrongful application of fair hiring hall rules, is in the Board's opinion a speculative exercise at best. It cannot be said with any certainty that the complainant would have necessarily followed the pattern of employment for the entire year of any particular member referred ahead of him.

The Board noted that no formula can be absolutely certain, but was satisfied that the most just solution would be to determine the average earnings of the general membership of the union local, to compare them to the earnings of the complainant, and to make some allowance for his personal circumstances and his conduct, particularly any failure to mitigate losses.

The Board therefore determined the average earnings of the members of the local for 1981. From that figure the Board deducted the amount which the complainant actually earned in 1981. A further deduction was made to reflect the fact that the complainant quit another job he had in 1981, but failed to provide the Board with a proper explanation for quitting. Finally, the Board reduced the figure again, to reflect the fact that the complainant was disabled and therefore unavailable to work for a period of time during 1981. In total, the Board awarded the complainant $4,341.86, and interest.

In determining the amount of compensation, the Board rejected the union's contention that the complainant's unemployment insurance benefits ought to be deducted from the calculated amount. Firstly, the Board could discern no evidence to determine the proportion of the amount received in unemployment insurance that was attributable to periods for which he would have been at work but for the union's violations of the *Labour Relations Act*. More importantly, the Board noted that to the extent that the compensation award would be in the nature of damages, and not for remuneration not paid to him, judicial authority would not support the abatement of the claim by the amount of unemploment insurance benefits received. *Joe Portiss* |1983| OLRB Rep. Sept. 1554.

Purchaser of nursing home licence held to be successor employer

The union brought a section 63 application contending that the respondent was a successor employer. The respondent had opened a 51 bed nursing home on Water Street in Peterborough, on land purchased from the previous employer. During the same month the predecessor employer's home of the same size closed on London Street. The Ministry of Health had authorized the sale of the licence from the predecessor employer to the respondent. The new home absorbed almost all of the residents from the home that closed down. The old home could no longer be utilized as a nursing home because it was unsafe.

The Board took a purposive approach to interpreting what constitutes a sale of a business within the section 63 definition. It noted that in a labour relations setting the words "sale" and "business" can have different meanings than in a commercial law context. The competing concerns section 63 is calculated to balance where set out:

1) the claim of the predecessor's employees to continue to be employed under the same terms and conditions of employment and to continue to be represented by their chosen bargaining agent,

2) the entrepreneurial freedom of both the predecessor and the successor employers, and

3) the interests of the successor's pre-existing work force, if any. Whether a transaction is properly labelled as a "sale of business" depends on a reconciliation of these competing concerns. The Board illustrated this point by extensive references to its earlier decisions. It observed, *inter alia,* that with rare exception, no sale of a business had been found where the predecessor retained all of its employees, and continued to apply an existing collective agreement because neither the predecessor's employees nor their bargaining agent were prejudiced by the alleged sale *(Canada Cement Lafarge)* but a sale was found where the assets and customers of a business passed from the predecessor to the purchaser, because the purchaser's interests of

> entrepreneurial freedom were outweighed by the predecessor's employees' interest in continued employment where the nature of the work performed was unchanged. *(Dutch Boy Food Markets)*.

Having discerned the key considerations applicable to a section 63 determination of a "sale of a business" in the private sector, the Board then considered the intervention of a government licence-granting body. Two earlier Board decisions dealing with successor rights in licence transfer situations, *Metropolitan Parking* and *Thunder Bay Ambulance*, were distinguished on the facts. The Board found itself driven back to the general language of the statute and the balance it strikes between competing interests. The role of the Ministry of Health was treated as irrelevant to the central issue, as it had merely acted as an agent or conduit facilitating the transaction. The salient facts were: 1) the successor had purchased the licence, the essence of the predecessor's business, and had acquired almost all of the predecessor's former residents 2) all of the predecessor's employees had been terminated, and 3) new employees had been hired by the successor. The respondent was held to be the successor employer. *Riverview Manor*, |1983| OLRB Rep. Sept. 1564.

Two-tier membership fee held not to invalidate membership evidence

In this application for certification, the respondent employer made a number of submissions to the effect that the Board ought not to accept the membership evidence submitted by the applicant trade union. The employer alleged that the union, in its organizing campaign, suggested that a number of benefits would automatically follow in the event that employees become union members upon the conclusion of a collective agreement. The employer also expressed concern that while the union was charging a $1.00 initiation fee during its organizing campaign, employees were told that the fee would rise to $300.00 after certification.

On the allegation that the union promised employees unreasonable benefits for joining the union, the Board indicated that it would draw a line between "salesmanship" on the one hand, and improper conduct on the other. Improper conduct, the Board stated, involves fundamental misrepresentation, coercion and intimidation. In the instant case the employees were well aware that they were being asked to join a trade union, and that the benefits promised could only come about through bilateral negotiations. The line of misrepresentation, coercion or intimidation had not been crossed. The Board rejected this allegation.

The Board also considered whether the two-tiered fee structure which the employer alleged was instituted by the union was unacceptable. The Board, in all certification applications, requires trade unions to have each member employee pay at least $1.00 in the form of an initiation fee. A trade union which normally has a higher initiation fee, but institutes a special fee to eliminate the financial impediment to organizing, acts properly if the special fee is not used as a threat of a penalty to those employees who would refrain from joining the union prior to certification. The proper question, the Board stated, is whether the employees wish to become part of the trade union or not. Any two-level system of initiation fees causes a problem for the Board so long as the higher level is made to apply before or immediately upon certification. An acceptable two-tiered system must allow all employees employed at the time of the organizing campaign a reasonable opportunity to join for the lower fee after it has been determined whether the union will be certified.

The facts of the instant case suggested that the union made quite clear that the lower initiation fee of $1.00 would apply up until the signing of the first collective agreement. There was some confusion as to this amongst employees, and some rank-and-file employees communicated the idea that the higher fee would go into effect immediately upon certification. But no union official ever contributed to this misunderstanding and the union could have been easily contacted for clarification.

Based on these facts, the Board determined that the union's membership evidence was acceptable. Because the membership evidence as submitted indicated that more than 55% of the employees in the bargaining unit were members of the union, a certificate issued to the applicant trade union. *Haughton Graphics Limited*, |1983| OLRB Rep. Sept. 1464

Employees returning to work after striking for over six months not having right to bump junior employees

After a lawful strike had continued for more than six months the parties were able to resolve all their differences, the only dispute remaining being the right of the striking employees to bump more junior employees, who participated in the strike when it commenced but had returned to work within the six month period pursuant to section 73. The union claimed that returning employees with seniority had a right to bump more junior employees who had returned to work pursuant to section 73 and that the denial of this right by the employer constituted a contravention of sections 3, 15, 66(a) and 70 of the Act. The union characterized the employer's scheme of recall as amounting to a grant of "super-seniority" to employees who supported the employer by returning to work early and a punishment for those who continued to exercise their right to strike.

The Board, citing authorities holding that the employees returning to work after a strike had continued for more than six months had no right to their jobs vis-a-vis replacement employees, held that they could not be in any better position vis-a-vis those bargaining unit employees who had struck work but decided to end the strike and return to work. The Board concluded that "the situation in which striking employees found themselves at the conclusion of the strike was the incidental effect of having engaged in a lawful strike which they could not end on more preferable terms, and not the product of any discriminatory intent by their employer in violation of the *Labour Relations Act*". The Board went on to observe however, that "There is a very strong argument that any ... distinction between striking employees and those who continued to work, over and above the transitional recall problem disclosed in this case, should trigger a violation of the Act." The complaint was dismissed. *Mini Skool Ltd.*, |1983| OLRB Rep. Sept. 1514.

Failure to disclose plant-closure bad faith bargaining

The union and the employer engaged in negotiations to renew a collective agreement and on January 13, 1983 agreed upon a memorandum of settlement, with neither party raising the subject of a possible plant closure. On March 1, 1983 the employer announced that it was permanently closing down the plant. The union filed a complaint alleging that had it been aware of the impending plant closure it would have taken a different approach to bargaining and that the failure on the part of the employer to disclose the closure constituted bad faith bargaining. The employer's position was that the corporate decision to close-down the plant was not taken until after the collective agreement had been concluded.

Noting the *Westinghouse* decision which had held that disclosure is necessary where a *de facto* decision exists, the Board stated that when a plant closure is announced "on the heels" of the signing of a collective agreement, a rebuttable presumption may arise that the decision-making was either sufficiently ripe during bargaining to have required disclosure or was intentionally delayed.

The Board stated " ... the more fundamental the decision on the workplace, the less likely this Board should be willing to accept fine distinctions in timing between "proposals" and "decisions" at face value, particularly when strong confirmatory evidence that the decision-making was not manipulated is lacking". The Board further stated that a strong argument can be made that the *de facto* decision doctrine should be expanded to include "highly probable decisions" or "effective recommendations" when so fundamental an issue as a plant closure is at stake.

Turning to the evidence before it, the Board stated that it found it difficult to accept that the employer would make such a major decision with a cost in excess of $2 million so quickly and with such a minimum of formal analysis and documentation. The Board concluded that from all of the evidence before it, at the very least, a rebuttable presumption arose that the employer either manipulated the timing of the decision to avoid bargaining or withheld a de facto decision from the union. Given the magnitude of the decision and its timing, the Board drew an adverse inference from the employer's failure to call as a witness the person who was responsible for making the recommendation to close the plant. In the circumstances, the employer failed to rebut the presumption and was found to have contravened the duty to bargain in good faith. On the issue of remedy, the Board rejected the request for back pay and a direction to bargain as having a propensity for over-compensation and therefore becoming punitive. Observing that a direction to re-open the plant was impractical and not justified in the circumstances, the Board instructed the Registrar to re-schedule the matter for a hearing on the remedial aspects. *Consolidated Bathurst Packaging Ltd.* |1983| OLRB Rep. Sept. 1411.

Religious objection based on OFL resolution recognizing PLO too remote

The applicant, a rabbi and a doctor of philosophy, sought exemption from the collective agreement's requirement of paying dues to OPSEU on the basis that OPSEU, an affiliate of the OFL, did not publicly disassociate itself from an OFL resolution requesting the CLC to urge the Canadian Government to support the Middle East peace proposal based in part on recognition of the PLO and the pre-1967 boundaries. The applicant regarded the OFL resolution as a personal affront and an attack against his faith and his identity as a Jew. The Board concluded that the applicant, as a religious person, has given "a patently unreasonable religious interpretation to an event" and thereby asserted a personal feeling or political view point. The Board noted that the applicant's objection was mainly on the basis, not of the contents of the resolution, but of the failure of OPSEU to publicly disassociate itself from it. In view of the evidence that OPSEU did not have a policy of its own on the Middle East issue and the fact that the OFL resolution was rejected by the CLC, the Board concluded that the applicant's objections were too remote with respect to OPSEU to satisfy the Board that his objections were because of religious convictions. In dismissing the application the Board declined to follow the *Forer* decision, in which the Ontario Public Service Labour Relations Tribunal granted an exemption in similar circumstances. *Humber College re J.I. Schochet*, |1983| OLRB Rep. Sept. 1472.

Petition not voluntary: Board reviewing extent of employer freedom of speech

In this application for certification, the applicant trade union had sufficient membership evidence to warrant certification without a representation vote. However, a number of employee petitions opposing the union were submitted to the Board, indicating that some employees who originally joined the union may have had a change of heart. The petitions, if accepted by the Board, would have reduced union support such that a representation vote, rather than immediate certification, would have been required. The union, however, argued that the petitions were not voluntary, and could therefore not be accepted as reliable evidence of employee desires. The union had three reasons for asserting that the petitions were involuntary. First, the union questioned the open circulation of the petitions during working hours. Second, the union referred to the fact that improved employment benefits were conferred on the employees by management in the course of the organizing campaign. Third, the union argued that the Board ought to be concerned with the speeches delivered by management to the employees. The union's allegations were asserted with a view to impugning the petitions and there was no allegation that the employer had committed on unfair labour practice. The Board noted that the onus of demonstrating that a petition is voluntary rests with those who rely upon it. The Board may reject a petition as involuntary even if there was no direct employer involvement. Rather, a petition may be reasonably perceived to be employer supported, even though it is not. Similarily, actions by petitioners which give rise to a reasonable perception of employer support can lead the Board to discount a petition. Based on these observations, the Board proceeded to consider the union's allegations.

First, was the petition openly circulated on the employer's premises during working hours? The evidence showed this to be the case. Consequently, a reasonable employee might conclude that management was aware of and tacitly supported the actions of the petitioners. In the Board's view, two facts supported this conclusion. First, the petitions activities occurred on the plant floor or in the cafeteria within the view of management. Second, these activities were carried on, at least to some degree, during working hours when the petitioners were generally subject to employer direction.

The second contention of the union was that the employer's alteration of some of the employment conditions, during the organizing campaign, also rendered the petition involuntary. The evidence indicated that the employer instituted a wage increase of thirty cents per hour on the same day that the organizing campaign commenced. However, this wage increase reflected a regular annual increase that was usually passed on to employees. Almost one month later, the employer further announced that it would be making significantly increased contributions toward employee public health insurance coverage. On the same date, employees were told that they would be given free garments, as part of a program in which customers and other employees throughout Canada would also benefit.

The Board stated that it was more concerned with the perception of employees than with the intention of management. Uncustomary generosity during an organizing drive could create an impression of intentional management interference in the campaign. On the facts, there was nothing unusual about the thirty cent wage increase, as it followed an annual pattern. But the health insurance contributions and free garments were unusual. A reasonable employee might have well thought that the work force was being offered a bribe to reject the union. One employee witness testified that he did not consider the improvements to be bribes, but the Board explained that it had to carefully consider the facts and to draw from them reasonable inferences about the reaction of the entire work force. In addition, the Board noted that employees may be reluctant to disclose, in the presence of their employer, perceptions which adversely affect management interests. For these reasons, the Board generally refuses to inquire into the subjective motivation of individual employees. The Board therefore concluded that the increased health insurance contributions, together with the free garments, rendered the petition involuntary.

Third, the union expressed concern about the speeches delivered by management to the employees. The Board carefully reviewed its own jurisprudence on this issue. Mere expression of opposition by an employer to unionization, during an organizing campaign, has been held not to be an unfair labour practice (specifically, not contrary to section 64 of the *Labour Relations Act*). The Board has also upheld employer attempts to convince employees that any advantages of collective bargaining are outweighed by the drawbacks. Employers might discuss wages and benefits, on the one hand, and exclusivity and union security on the other. To this end, employers have been permitted to compare their wages and benefits to those prevailing elsewhere. The Board will also tolerate employer suggestions that collective bargaining could result in an end to dealings between the employer and individual employees. Employers may tell employees that collective agreements commonly make the payment of dues and union membership mandatory; that striking could be required of them by the union; and that certification of the union is possible without a representation vote. Even in the face of ambiguity, exaggeration and falsehood, the Board has been reluctant to strike down campaign propaganda, issued by either management or labour, relating to the subjects referred to above. The Board recognizes that campaigning is a political, and not a legal, process, and falsehoods can usually be regulated through the political process better than by legal intervention.

However, the Board warned that an employer raising the spectre of a loss of jobs increases a significant risk of running afoul of the law. Threats that an employer will react to collective bargaining by forcing job terminations are unacceptable. Predictions that collective bargaining could lead to lost jobs, made in the abstract during an organizing campaign, are also generally not tolerated. On the other hand, predictions which are carefully phrased on the basis of objective fact, and which might suggest a negative impact on jobs due to collective bargaining but completely beyond the control of the employer, might be acceptable.

Finally, the Board noted that not only the content of an employer's message, but the medium by which it is delivered, is relevant. The term captive audience has frequently been applied to meetings convened by management during working hours. Although the Board has refrained from holding a speech delivered at such a gathering to be a *per se* violation, the existence of a captive audience has often been relied upon, in conjunction with the speaker's comments, to find an unfair labour practice.

In the instant case, the union challenged the employer's speeches on three grounds. First, the employer referred to the fact that dues would become payable upon certification. The union argued that this constituted a misrepresentation about union security, because the employer implied that dues would become payable by all employees immediately upon certification. The Board disagreed with the union on this point. In the Board's view, the employer's remarks were substantially accurate.

The union was also concerned about the employer's references to layoffs and plant closings. In one of the speeches, the employer referred to its traditional absence of a union, and commented that "these factors combined have enabled us to weather the storm during the recent recession in better condition than many other employers. We have been able to avoid the same kinds of lay-offs and plant closures which have been experienced by many other companies." The Board concluded that employees might easily have understood the management to be saying that the absence of a union contributed to their continued employment in the past. They might also reasonably have thought that the employer was predicting that the certification of the union would lead to a loss of jobs in the future. The statement was made in the abstract, as it was not addressed to an industry-wide contract or to a union's wage proposals. On top of this, the Board noted the union's contention that the meeting at which these comments were made began during a coffee break and continued into working time; the audience was captive at least toward the end. The Board therefore held that in this setting, the remarks exerted an influence that coloured the petition.

For all of these reasons, the Board rejected the petition as involuntary. A certificate issued to the applicant union. *Vogue Brassiere Inc.*, |1983| OLRB Rep. Oct. 1737.

Suspension for refusing to work without safety equipment unlawful

This complaint arose out of a three day suspension imposed on the complainant because he refused to enter and work inside a "lead pot" wearing only a small face mask and shield, instead of an "air-hat" (which completely covers and employee's head and is equipped with a battery powered air pump and filter) which was usually required to be worn when entering the lead pot. The evidence was that the "air-hat" was being repaired for a defect at the time. The employer contended that the refusal to work was not motivated by health and safety concerns.

The evidence indicated that for several years there had been concern expressed, both by the employer and the Ministry, relating to the excessive exposure of employees of the employer to lead, resulting from improper work procedures and improper use of equipment by employees. The employer had taken several steps to minimize this hazard, including the introduction, in June 1982, of an "air-hat" to replace a small face mask, to be worn by anyone entering the lead pot. Several employees, including the complainant, were issued verbal and written warnings for not wearing the proper safety equipment when entering the lead pot. The employer posted a notice requiring the proper use of safety equipment and warned that breaches in this regard could result in discipline up to and including discharge.

The respondent employer, pointed to the instances in the past, where the complainant had breached safety procedures and contended that the complainant's refusal was motivated not by a safety concern but by unjustified fear of being disciplined for not wearing the air hat. The Board, noting that the "obey now and grieve later" rule does not apply in relation to refusals coming within the protection of the *OHSA*, stated that the issue was not whether the work was in fact unsafe, but whether at the time of refusal the complainant had reasonable cause to believe that it was unsafe. The Board noted that since the safety infractions by the complainant, the employer had posted several notices demanding compliance with safety procedure and had disciplined employees for infractions. The Board concluded that these events would have led a reasonable employee to conclude that working in the lead pot without the air hat was unsafe. On the evidence, the Board concluded that the complainant had such reasonable cause to believe, and that it was his belief that caused him to refuse to do the work in question. The respondent was directed to compensate the complainant for the three days and to remove any reference to the suspension from the complainant's personnel file. *Wilco Canada Inc.* |1983| OLRB Rep. Oct. 1759.

Reduction in work hours upon refusal of concessions unlawful lockout

The Board recently dealt with two separate unfair labour practice complaints filed by the IBEW and the Labourers International Union respectively. In both the respondent was identical and the complaints arose out of the same employer action.

The respondent, a general contractor, was having a productivity problem with the major trade on site, the pipefitters. The respondent and the pipefitters agreed that the pipefitters would work four nine hour days at straight time, (rather than four eight hour days and four hours on Friday) and that the project would be shutdown on Fridays. Having obtained this agreement, the respondent notified the other trades that the site would be shutdown on Fridays and that these trades would henceforth work only four eight hour days, *unless* they agreed to work four nine hour days at straight time, as the pipefitters had agreed to do. This amounted to a reduction in work hours, unless these trades agreed to waive their overtime entitlement under their respective collective agreements. The complainants' members reported for work on the next Friday, but found that the project had in fact been shutdown. The issue before the Board was whether this amounted to a "lock-out" within the meaning of the Act.

The Board noted that the act does not entitle an employer to withdraw employment opportunities during the life of a collective agreement simply for the purpose of improving on the deal contained in the collective agreement. While recognizing the positive benefits of an employer discussing in advance with the bargaining agent management decisions that will significantly bear on the employment opportunities of his employees, the Board stated that, given the strict prohibition in the Act against lockouts during the term of a collective agreement, the Board "must be scrupulous in its analysis of each case, lest a plea of 'economic circumstances' be used to mask an attempt simply to obtain better terms and conditions than have been agreed upon in the collective agreement." On the facts before it, the Board concluded that the respondent could not use the agreement with the pipefitters as justification to unilaterally close down the project site. The respondent's conduct was held to be an unlawful lockout in direct contravention of sections 72 and 75. The attempt to vary the rights under the provincial agreement was also held to be a contravention of section 146(2) of the Act. *C.E. Lummus Canada Ltd.* |1983| OLRB Rep. Sept. 1504, and |1983| OLRB Rep. Oct. 1688.

Employer communications regarding concession package held not to be an unfair labour practice

The Board heard a complaint under section 89 of the *Labour Relations Act* in which the complaint alleged that the respondent company contravened sections 64 and 67(1) of the Act. The respondent had approached three union locals of the (C.L.C.) Can Workers Union with proposals to enter into an "extension agreement". The effect of such an agreement would be an extension of the current agreement with only a few modifications. Similar agreements had already been entered into by the four major companies in the same industry in the United States and a competitor had reached such an agreement in Canada. The respondent felt that without such an agreement in Canada with its employees its own competitive position would be undermined. Two of the Locals entered into an extension agreement, but the third, the complainant, refused to even discuss the matter with the respondent.

The respondent appealed to members of the complainant by way of letter, outlining its precarious competitive position and urging them to encourage their elected union representatives to meet with the respondent to discuss an extension agreement. An outline of the proposals for the "extension agreement" was attached to that letter. Executives of the employer "toured" the plant and discussed the situation with some of the employees, including two union officials of the complainant. This was followed up with another letter to employees, outlining the employer's position and noting the complainant's continuing refusal to discuss the matter with management.

The Board found that while the complainant had appealed directly to the membership by way of conversations and letters, the substance of such communications indicated that the respondent continued to recognize the complainant as the exclusive bargaining agent of the employees at the plant. Accordingly, the Board found no violation of section 67(1) of the *Labour Relations Act*.

With respect to the section 64 complaint, the Board found that the impugned communications did not constitute coercion, intimidation, threats, promises or undue influence in the circumstances of the case which involved a well-established collective bargaining relationship and a history of employer direct communications with employees to which the union had never previously objected. The Board therefore found that the respondent's conduct fell within the ambit of free speech guaranteed by section 64 of the Act.

The Board noted, however, that its decision should not be taken as meaning that direct communication by senior members of management with bargaining unit employees will not be closely scrutinized by the Board or that further communications regarding the lack of response by the complainant to company proposals would not take the respondent beyond the ambit of guaranteed free speech and into the realm of undue influence. *American Can Canada Inc.*, |1983| OLRB Rep. Oct. 1609.

Receiver not a successor employer

The applicant union held bargaining rights for, and had entered into a collective agreement on behalf of, a group of employees of Romi Nursing Homes Ltd. Romi failed to make payments on a security interest charged in favour of a bank for a loan received. The Bank appointed Price Waterhouse as receiver/manager under the terms of the debenture. Price, acting as receiver/manager operated the Romi business as a going concern, while endeavouring to find a suitable purchaser for the business. The applicant claimed that the Bank and/or the receiver were successor employers, or in the alternative, related employers within the meaning of the *Labour Relations Act*.

The Board, held that on the appointment of a receiver/manager by private appointment, the receiver/manager managed the business for Romi, and that therefore, the applicant's bargaining rights were not extinguished as far as Romi was concerned. In fact, the evidence was that Price had honoured the terms of the agreement since its appointment. Since there had been no sale or disposition within the meaning of section 63, that aspect of the application was dismissed.

Noting that the related employer provision was not a proper means to collect Romi's uncollectable debts from its solvent creditor, the bank, the Board found that none of the prerequisites for the application of section 1(4) was present and that that aspect of the application was also dismissed. *Price Waterhouse Limited and CIBC*, |1983| OLRB Rep. Oct. 1706.

Extent of objectors' right to notice and participation in certification hearings

This was a certification application in which there were disputes as to the employee list and the composition of the bargaining unit. In addition, certain objectors had filed a petition in opposition to the union. The Board concluded that the petition could not affect the outcome of the application however the other issues are resolved, because there was no overlap with membership evidence. The parties were advised orally that an officer would be appointed and that the parties including the objectors would receive notice in due course. The union objected to the continued status of the objectors, contending they have status only for the purpose of providing evidence on the validity of the petition. It was submitted that once it is decided that the petition is irrelevant they should not be accorded status in respect of any other issue in the proceedings.

The Board disagreed. The Board noted the many areas in which an individual employee's right may be affected by the issuance of a certificate and held that the rules of natural justice require that persons so affected be accorded the right to have notice and participate in the proceedings. The Board rejected the argument that a concerned employee's ability to offer himself as a witness to one of the union or employer, was sufficient recognition of employee interests. The Board accordingly confirmed that the objectors would be given notice of further proceedings and accorded the opportunity to participate therein. *Tektron Equipment Corporation*, |1983| OLRB Rep. Nov. 1932.

Threat of plant closure and terminations – No vote directed despite voluntary petition

This was a certification application in which the union had submitted sufficient membership evidence as would usually entitle it to certification without a vote. However, the Board also received a timely petition in opposition to the union, which the Board found to be voluntary and which had sufficient overlap to normally cast doubt as to whether the union had the continued support of more than 55% of the unit employees as would cause the Board to direct the taking of a representation vote.

The evidence disclosed that during the organizing campaign by the union there had been threats of plant closure and termination of employees and indeed the actual termination of a union supporter. In the face of this evidence, without making specific findings of violations of the Act on the part of either the petitioners or the employer, the Board concluded that the events in question had created an atmosphere in the workplace in which a vote is not likely to represent the true wishes of the employees. In the circumstances the Board concluded that this was not an appropriate case to apply the policy regarding petitions enunciated in *Baltimore Aircoil* and direct a vote. The union was certified on the basis of the membership evidence filed. *Ferrum Metal Mfg. Co.*, |1983| OLRB Rep. Nov. 1830.

Refusal to file discharge grievance found to be arbitrary

This was an unfair labour practice complaint alleging that the respondent union had acted contrary to the duty of fair representation in the manner in which it handled the complainant's grievance against his indefinite lay-off, which was designed to permanently terminate his employment. The evidence was that from the time of his employment in August, 1980, the complainant had been a capable worker. Then his performance drastically deteriorated during the last two months prior to his discharge. He received several verbal warnings and was told that his job was in jeopardy. The employer also had a union official talk to the complainant and attempt to find out the cause of the problems, before deciding to discharge him. When the union representative learned the complainant was going to be discharged, he asked the employer, without consulting the complainant, to change the discharge to an indefinite lay-off. The union took the position that that was all it could do and that a grievance against the indefinite lay-off would not succeed because the complainant had received prior warnings and because no fellow employees would support him.

The Board found that the complainant did not accept the union's response and repeatedly sought to discuss the matter with the union. His numerous telephone calls and a letter were ignored by the union because, as the union explained, the matter had become a "non-priority". The Board found that the union had not asked the company for specifics of its complaint against the complainant's work. It did not ask the complainant for his side of the story and did not inquire into the complainant's allegation that a fellow employee was attempting to have him fired. The union questioned the complainant's fellow employees but never confronted the complainant for his comment, with the allegations the fellow employees had made against him. In deciding that a grievance would not be successful, the union had failed to consider the complainant's clean employment record and the sudden deterioration of his performance. The arbitral principle of progressive discipline was not considered either. While section 68 does not guarantee the arbitration of a discharge grievance in every case, the Board stated that the section may be responsive to the seriousness of a disciplinary discharge.

The Board concluded that the union had declined to file a grievance of a discharged employee with no prior disciplinary record, on the basis of a superficial inquiry and without asking for the complainant's side of the story. The Board concluded that this conduct amount to arbitrariness in breach of the union's duty of fair representation. *Swing Stage Ltd.*, |1983| OLRB Rep. Nov. 1920.

Mass resignation by teachers found to be an unlawful strike

The union and the employer were parties to a collective agreement with respect to the regular day school programme. For years, the union had unsuccessfully attempted to negotiate preferred access and wage parity for its members with respect to the employer's summer programmes. During the most recent round of negotiations, the employer had again denied the union's demands relating to the summer programmes. Consequently, the union issued a "pink letter" to all of its members, enjoining members from applying for or accepting teaching positions in the summer programme, and making it clear that those who had already accepted teaching positions in the summer programme were expected to resign. The union warned that those who failed to comply risked the imposition of sanctions. The union prepared a draft resignation letter, which was used by most of the teachers who subsequently tendered their resignations from the teaching positions they had accepted in the summer programme. On these facts, the employer complained that by this mass resignation, the teachers had engaged in an unlawful strike, which was actively encouraged, procured and supported by officials of the union.

The resignees argued *inter alia*, that at the time of their resignation there was no subsisting employment relationship with respect to the summer programme and that if there was an employment relationship, what had taken place was a series of individual "quits", rather than concerted activity. It was further submitted in the alternative, that the right to quit is the right of every employee, and even if undertaken in concert, cannot be considered to be a "strike" within the meaning of the Act.

Noting that the resignations came as a response to solicitation by the union, the Board found that there was concerted activity. The Board found that the resignations were not true "quits", since the resignees were willing to continue if the collective bargaining dispute could be resolved. There was no unconditional or irrevocable severance of the employment relationship. Rather, the whole purpose of the resignations was to put pressure on the employer to make concessions. While it was recognized that in common law there may be a distinction between a "contract of hiring" and a "contract of employment" the Board did not think that such common law distinctions should necessarily govern the interpretation of the *Labour Relations Act* and that the Board was required to interpret section 1(1)(o) to accommodate the statutory objective of promoting industrial peace. The Board found that the resignees were "employees" for purposes of section 1(1)(o). The ingredients for a "strike" being present, the Board found that the mass resignation was a strike. Since the union had not sought certification with respect to the summer programmes and since no resort had been had to the conciliation process, the strike was found to be both untimely and illegal. The Board further found that the union had breached section 74 by encouraging and supporting the unlawful strike. The complaint was dismissed as it related to certain individual officials of the union. *Board of Education for the Borough of Scarborough*, |1983| OLRB Rep. Nov. 1889.

Complaint not entertained because of extreme delay in filing

The complainant in this case alleged that his trade union violated its duty of fair representation to him, contrary to section 68 of the *Labour Relations Act*. The trade union rejected the complainant's allegation, but also argued that the complaint was untimely due to the complainant's delay in filing. It urged the Board to exercise its discretion not to proceed with the complaint, pursuant to section 89(4) of the Act.

The complainant was terminated from his employment in October 1979. The trade union grieved the termination in December 1979 and in March of 1980, the grievance was referred to eventual arbitration. During the autumn of 1981, the union and the employer were involved in collective bargaining negotiations. It was the practice of the parties to resolve outstanding grievances during collective bargaining. The union initially refused to deal with the outstanding grievances after a lengthy strike, but eventually approximately 250 grievances were resolved, including the complainant's grievance. Some of these grievances were allowed, some were compromised, and some were withdrawn. The union attempted to pursue the complainant's grievance successfully, but the employer was unwilling to agree. After considering the merits of the grievance and the chances of success, the union withdrew the grievance in November of 1981. The complainant became aware of the withdrawal in February of 1982, but did not file the section 68 complaint with the Board until October of 1983.

The Board referred to its earlier jurisprudence on the question of delay. These cases recognize that time is of essence in labour relations. Claims under the *Labour Relations Act* ought to be asserted quickly and resolved expeditiously. Whether a delay will result in the Board refusing to hear a complaint depends on the circumstances of each case. In the past, the Board has considered such factors as the length of the delay and the reason for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves restrospective financial liability or could impact upon the pattern of relationships which have developed since the alleged contravention, and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. The Board will also accord some latitude to parties who are unaware of their statutory rights or, who through inexperience have taken some time to file a complaint. But there must be a limit, which should be measured in months rather than years. This approach, the Board noted, was approved by the Divisional Court in the *Sheller-Globe* decision (42 O.R. (2d) 73).

In the instant case, the Board found that there had been an extreme and unwarranted delay on the part of the complainant in filing his complaint. The delay of over a year and a half, together with the fact that the complaint sought a remedy, involving retrospective financial liability for the union and the employer, that the complainant's success could detrimentally harm the collective bargaining relationship between the union and the employer and that witnesses' recollections have faded and evidence has deteriorated, led the Board to exercise its discretion under section 89(4) of the Act, and to decline to consider the merits of the complaint.

The Board also commented that a trade union which ties grievance negotiations to the negotiation of a new collective agreement, in order to provide an underlying urgency for compromise and rational discussion, is not inherently unfair or arbitrary. The union had considered the merits of the grievance. There was no evidence that there was a trade-off against unrelated grievances or an exchange for a promise of value to other employees in the bargaining unit. The Board concluded that there was no breach of the union's duty of fair representation, but that as the complainant's allegations were delayed in the extreme, the complaint could be dismissed on the ground of delay, as well. *Stelco Inc.*, [1983] OLRB Rep. Dec. 2102.

Union's failure to grieve in compliance with decision of International's orders not unfair representation

Teamsters Local 230 represented the drivers employed by the employer in the Toronto area. Teamsters Local 879 represented drivers employed by other employers in the Hamilton area, including Oakville. The employer acquired a company in Oakville, and decided to integrate the dispatch systems in Toronto and Oakville, thereby requiring that the Oakville and Toronto seniority lists be integrated. Local 230 and its members were strongly opposed to this proposed integration, and the matter was adjudicated by the umbrella group for the area, Teamsters Joint Council No. 52. The Joint Council ordered the "dovetailing" of seniority, whereby the two seniority lists would be integrated such that the full seniority of the Local 879 drivers at the Oakville operation would be recognized. Local 230 was dissatisfied with this resolution, and appealed the decision to the International Union. A grievance against the employer was also filed, but the matter never proceeded to arbitration. Some Local 879 members were proceeding against Local 230 before the Labour Relations Board, and Local 230 decided that the issues ought to be resolved by the Board instead of an arbitrator. In the meantime, the International rejected Local 230's appeal, on the ground that the International Constitution forbids such appeals on collective bargaining matters. The president of Local 230 consulted counsel, and concluded that a court action against the International would fail. He concluded that he had no alternative but to advise the employer to dovetail the seniority lists. The Local 230 members then drafted grievances against the employer's move to dovetail the lists. The president of Local 230 refused to process the grievances, as he was advised by counsel that the Local - which advised the employer to dovetail - would be estopped from challenging such a move.

The issue was whether Local 230 violated its duty of fair representation, provided by section 68 of the *Labour Relations Act*, by refusing to proceed with the grievances of its members. The Board held that there was no violation of the Act. The Board viewed the issue in two ways. First, was the Local's adherence to the International's decision in itself a violation of section 68? And second, was the decision by the Joint Council in favour of dovetailing a statutory violation? The Board concluded, on the first point, that the decision to accept the International's authority was not a violation by the Local. The Board looked to the governing documents of the trade union, as there is a contractual element involved in the overall administration of a trade union. The Board noted that it would not interpret these governing documents, but would refer to them in determining whether the union acted arbitrary, discriminatory or in bad faith. In determining this, the Board must only satisfy itself that the union has in fact "turned its mind" to the problem in an honest and real way, as opposed to acting in a manner that appears arbitrary or in bad faith. A review of the relevant constitutional documents indicated that the Local's decision to comply with the International's ruling was not unreasonable. There was no doubt that the Local had made numerous efforts in its opposition to dovetailing, but without success.

The Board's second concern was whether the Joint Board's decision in favour of dovetailing was unreasonable. The American jurisprudence, the Board pointed out, indicates judicial reluctance to second guess a union's decision to "dovetail" or to "endtail" seniority lists. In the circumstances, there was nothing unreasonable in the decision to dovetail. *Dufferin Concrete Products*, [1983] OLRB Rep. Dec. 2014.

Board practice of "Full Board" meetings not breach of natural justice

The respondent sought reconsideration of a Board decision on grounds, *inter alia*, that the Board had engaged in an improper and illegal practice in the course of rendering such decision by discussing the case at a "full-board" meeting. It was submitted that if, at this "full-board" meeting, the panel which heard the case had discussed any of the evidence it heard, or had solicited or received views or expressions of opinion from other members of the Board who did not hear the case, the Board had engaged in an improper and illegal practice and its decision cannot stand.

Reviewing its role and mandate under the *Labour Relations Act*, the Board noted that the Act confers upon it broad discretion in determining how the statute should be implemented. In an administrative tribunal such as the board, decision-making is greatly influenced by policy considerations. In essence, the Board's legal and policy functions are inseparable, and are shaped on a case by case basis. The Board noted that to achieve consistency in advancing both law and policy, it requires all of the insight it can muster to evaluate the practical consequences of its decisions, for it lacks the capacity to ascertain by research and investigation just what impact its decisions may have on labour relations and the economy generally. Against these needs, the Board described the internal mechanisms it has developed of which full-board meetings are just one part. The Board specifically mentioned "weekly vice-chairmen's" meetings and research services provided by the Board's solicitors and law students.

Dealing with the impugned practice of "full-board" meetings, the Board noted that no minutes are kept and there is no attempt to achieve consensus by vote or otherwise. While policy considerations are reviewed by those in attendence, the facts of the case are taken as given by the panel and it is understood by everyone involved that the responsibility for the ultimate decision remains with the panel which heard the case. The Board felt that the respondent's argument basically fell back upon attempting to probe the mental processes of decision-makers. The consultations undertaken by the hearing panel with fellow board members in reality are no different from informal consultations a judge may have with brother judges or law clerks in the course of rendering a judgment. The "full-board" meetings merely attempt to institutionalize these discussions and better emphasize for a panel, broad ranging policy implications of individual decisions. Noting that the respondent's submissions ignored the institutional requirements of a modern administrative tribunal whose objective is to further harmonious relations between employers and employees, the Board concluded that the concept of natural justice, sensibly applied, did not demand more than the fairness accorded to the respondent. *Consolidated Bathurst Packaging Ltd.*, |1983| OLRB Rep. Dec. 1995.

Union's failure to enforce seniority rights held to be arbitrary conduct

The Board heard a complaint under section 89 of the *Labour Relations Act* alleging that the respondent dealt with the complainant in a manner contrary to section 68 in that the respondent had failed to recognize the complainant's accumulated seniority and recall rights respectively as guaranteed by the collective agreement. The evidence showed that shortly after the complainant was recalled from a lay-off, she was asked to fill out a new application for employment. From the time of her recall she was treated as a probationary employee. The complainant was laid off three other times during 1982, and each time she was asked to fill out a new application for employment upon recall. She did so and asked the respondent union's representatives whether this was proper, and she was informed that it was. At the time of her final lay-off, the complainant borrowed a copy of the collective agreement from a fellow worker. Her reading of the collective agreement was that she had retained previously acquired seniority during the periods she was on lay-off, and should not have been treated as a probationary employee thereafter. She drew this to the attention of the President of the Local, who told her that she was wrong in her interpretation, as the retention of seniority for up to one year while on lay-off applied only to temporary lay-offs, not to permanent lay-offs. He said her lay-off had been a permanent lay-off. He cited the union's business agent as authority for the advice given, but refused to give the complaint the name and telephone number of the business agent. The collective agreement did not use the terms "temporary" or "permanent" in describing lay-offs. It was apparent that the local union president used these terms in the sense defined in Regulations under the *Employment Standards Act*.

The Board reviewed the facts in light of its own jurisprudene on the question of what constitutes arbitrary conduct, and also took into account arbitral authority dealing with individual rights in collectively negotiated seniority structure. In synthesizing these considerations the Board noted that seniority rights have a special importance to trade unions and often critical importance to the employees they represent, and that a trade union may not lightly compromise seniority rights to secure benefits for others. Accordingly, employees may fairly expect a trade union to resist any suggestion that the seniority rights they have won be abandoned, restricted or narrowly interpreted, particularly in the climate of uncertainty which prevails in hard times when lay-offs of significant numbers of employees have occurred or were projected. From this perspective, the Board examined the respondent's conduct. The Board found that the union's view as to the distinction between permanent and temporary layoffs was inconsistent with the wording of the collective agreement. The Board concluded that the union's official had not properly put his mind to the relevant considerations in advising the complainant. The Board held that just as with discharge cases, unions are required to give serious consideration to complaints dealing with denial of seniority rights. The Board held that in advising the complainant that she had lost her seniority rights before her rehiring and that there was nothing she could do about it, the union acted in arbitrary fashion contrary to section 68.

With respect to a remedy, the Board ordered the respondent to retain and instruct legal counsel approved by the complainant, to draft and present a grievance with sufficient scope to take in all the defaults which flowed from the company's first and subsequent failures to recognize the complainant's seniority. The Board made further provision for the ultimate arbitration of the grievance if the grievance was not resolved to the satisfaction of the complainant and for the posting of a Board notice of violation. *Savage Shoes*, |1983| OLRB Rep. Dec. 2067.

Incumbent's threats to expel members supporting raiding union held not to be unfair labour practice

The respondent union, in the face of an organizing drive by the complainant union attempting to displace the respondent, had posted a notice on the union bulletin board indicating that anyone actively engaged in the distributing and signing of cards for the complainant was in violation of the repondent's by-laws and would be subject to charges. Following the posting of this notice, the complainant's previously well received displacement drive fell on deaf ears. The complainant argued that section 70 was violated because the purpose of the posting of the notice was to cause employees to fear that if they sign into membership in the complainant, they would jeopardize their continued employment.

The Board noted that the notice did not refer to possible loss of employment. Further, the Board noted section 46(2) of the Act gives the employees protection sufficient to remove the possibility of a loss of employment for activities in support of the complainant. It was also noted that at the beginning of their campaign the complainant union had sent letters to all unionized employees informing them of their rights under section 46(2). The Board, therefore found that in the absence of sufficient evidence to support a finding that the notice was intended to or threatened employment, the threat of expulsion from membership of those who support the complainant, was clearly the message conveyed by the notice and was not a violation of section 70. The Board added that if such threats of expulsion from membership constituted intimidation or coercion within the meaning of section 70, the section 46(2) protections would not be necessary in the Act. *Energy and Chemical Workers Union, and United Cement, Lime, Gypsum and Allied Workers International Union*, |1983| OLRB Rep. Dec. 2125.

Second termination application within two months not entertained

A group of employees applied to have the bargaining rights of the incumbent trade union terminated. Less than two months before, another application for termination of bargaining rights was filed by a group of employees, but that original application was dismissed by the Board just a few days before the second application was filed. In the meantime, the trade union and the employer were negotiating for a renewal of their collective agreement, although these negotiations had been temporarily suspended pending the first termination application. The union opposed this second termination application, citing section 103(2)(i) of the *Labour Relations Act*. That provision gives the Board the discretion to bar or refuse to entertain a new application within ten months of an unsuccessful application. A few matters were raised in opposition to the union's argument. First, it was contended that certain alleged violations of the union's duty of fair representation should lead the Board to exercise its discretion in favour of permitting the termination application to proceed. Second, it was submitted that section 103(2)(i) can be a bar to a second termination application only if the Board specifically imposed a bar when dismissing the first application. Third, it was argued that a refusal to entertain this second application would be a violation of the *Charter of Rights and Freedoms*.

The Board analyzed the jurisprudence concerning section 103(2)(i), and noted that it was designed to balance two conflicting policy objectives. The first is the freedom of employees to withdraw from the world of collective bargaining. The other goal is stability in employment relations. Both employers and employees have an interest in a measure of continuity in the process whereby terms and conditions of employment are determined. An application to terminate bargaining rights, successful or not, impairs the functioning of a collective bargaining relationship that was when created, and still may be, the choice of majority of employees. The Board noted that the *Labour Relations Act* limits the "open season" for termination applications. In the case of section 103(2)(i), the Board is delegated the discretion to restrict the open season, having regard to the conflicting policy objectives.

The Board noted that there was no recent election in the instant case to indicate employee opinion, and this factor tends to favour a less restrictive approach in exercising the section 103(2)(i) discretion. On the other hand, the employer and the union had never been given a proper opportunity to renegotiate a collective agreement. Another termination application would further impair the collective bargaining process. On balance, the Board concluded that it ought to refuse to entertain this second termination application.

The Board also rejected the contention that it ought to consider the application, in light of the union's alleged violation of its section 68 duty of fair representation. The Board noted that a large part of the section 68 allegation involved employees who were not union members being excluded from the union's decision-making processes. Both the Ontario and B.C. Boards have in the past ruled that in certain circumstances, this is not improper. However, the Board refused to rule as to whether section 68 had in fact been violated, because the existence of a violation would not alter the outcome of the case. The Board is provided with sweeping remedial powers, by virtue of section 89, in dealing with section 68 violations, and that is the means by which section 68 rights ought to be vindicated.

Furthermore, the Board held that its discretion to refuse to entertain a termination application existed, even though the right to file a second application was not specifically barred by the Board's decision dismissing the first application. Section 103(2)(i), the Board observed, authorizes the Board to either "bar an unsuccessful applicant" prospectively when dismissing a first application or to "refuse to entertain a second application" when it is made.

Finally, the argument that the Board refusal to entertain the application constituted a denial of the employees' freedom of association, as guaranteed by the *Charter of Rights and Freedom*, was dismissed. In the Board's view, freedom of association does not entail the freedom to terminate a union's bargaining rights. But even if there was a *prima facie* violation of freedom of association, the Board's refusal to proceed would merely be implementing a limit prescribed by law that is demonstrably justified in a free and democratic society. *K-Mart Canada Limited*, |1983| OLRB Rep. Dec. 2039

Delay in filing - Board entertaining complaint in absence of evidence of prejudice

The Board dealt with a union complaint alleging that the respondent employer had breached sections 3, 15, 64 and 66 of the *Labour Relations Act* by terminating a trade union activist following a picket line incident in June, 1982. The complaint was filed in September, 1983. The respondent made a preliminary motion for dismissal based on the delay in filing.

The Board reviewed the jurisprudence on the effect delay may have on the exercise of the Board's discretion under section 89(4) to inquire into a complaint. The Board noted that its jurisprudence and the arbitral and equitable doctrines of laches, while not co-extensive, have at their base a concern for unfairness to a respondent when delay causes prejudice. When a preliminary objection is made on the basis of delay, the Board must assess unfairness and prejudice in a context in which the complainant's allegations are assumed to be true.

Applying these principles to the case at hand, the Board noted that in the first four of the fifteen months between the discharge and filing of the complaint, the complainant sought to resolve the issue of the grievor's discharge during collective bargaining. The Board felt this was reasonable, and that the "delay clock" did not begin to run until the strike was settled in November 1982, without as the complainant alleged, resolving that issue. Thereafter the union sought to have the grievance arbitrated. The complainant's active efforts in this regard ceased only after the Legal Advisor to the Minister of Labour accepted the company's argument that the grievance was not arbitrable. With respect to the last five to six months of union activity prior to filing the complaint, there was no allegation that any witness or documentation had been lost by the respondent. In the result, the Board felt that there was no unfairness as would justify declining to hear the complaint. The Board left open the effect delay might have on any remedy, should the complaint be sustained. The Board also noted that the union's delay in ascribing anti-union animus to the employer's actions might be relevant to an assessment of the truth of the assertion. *John T. Hepburn Limited*, |1984| OLRB Rep. Jan. 39.

Allegations of coercion in soliciting union membership

A petition had been filed in this certification application. Cards signed by those employees who had not also signed the petition would alone have been sufficient in number for outright certification. Nevertheless, the respondent company argued that the Board should take the petition into account in determining whether to exercise its discretion under section 7(2) to order a vote. Counsel challenged the Board's ordinary practice of regarding petitions as irrelevant in circumstances such as these. He also argued that the Board should conduct its own investigation into allegations of coercion, intimidation and no-sign pressed by the objectors for the first time after the count was announced.

The Board reviewed its approach to the discretion afforded by section 7(2). It reaffirmed the Board's usual test for "relevance" of signatures on a voluntary petition, holding that approach to be consistent with the scheme of the *Labour Relations Act*. The Board also reviewed its policy with respect to "no sign" allegations, holding that it would deal with them in the customary manner even when raised as they had in this case. The post-hearing investigation later revealed no basis for a formal inquiry.

The nature of each of the objectors' allegations of intimidation and coercion was considered. The Board found the facts alleged insufficient, even if proven true, to lead it to order a vote. It was therefore unnecessary to rule on their timeliness. The Board reaffirmed its position that it will not undertake an investigation on its own initiative, it being the obligation of the party alleging intimidation or coercion to investigate, give adequate notice of, and prove such allegations. *Unlimited Textures Co. Ltd.*, [1984] OLRB Rep. Jan. 138.

Discretion not abused – No violation of duty of fair referral

This was a complaint alleging that the respondent union had contravened section 69 of the Act by failing to refer the complainant to certain jobs and by referring out-of-town members instead. The hiring hall in question was run by Ron Last, financial secretary and Business Manager of the local. He testified that when he took over, the system was riddled with abuses and did not operate efficiently or equitably. His attempts to correct this by formal classification of employee skills broke-down mainly because of non-co-operation of the members. Thereafter, in making referrals, Last relied upon his personal knowledge and investigation of members' skills.

In making an assignment he takes into account such factors as: whether the individuals have the required skills and abilities; whether they have expressed a preference for or against this type of assignment; the length of time they have been unemployed; whether their unemployment insurance benefits have expired; whether they are on welfare, or are suffering particular hardship by reason of family circumstance (age, illness, parental responsibilities, etc.); whether they have been able to find work or are working outside the trade; whether the job is short term or long term, whether further hirings are anticipated, and whether the individuals available have expressed any particular interest in or antipathy to the company making the request or the supervisors with whom they will have to work. Last testified that he tries to meet the employers' requests and distribute work in an equitable manner. Last pays special attention to the employees' past work record, if any, with the company making the request. A number of employees have established themselves with a particular company and go back year after year. In effect, they have steady employment with a seasonal layoff, cushioned by unemployment insurance benefits. Last makes an effort to maintain the continuity of these relationships and to reassemble the previous year's crew.

The practice of returning the same crew is of considerable advantage to employers and employees alike. The employers know that, by and large, they will be able to get back their core or key people who are known to be reliable and familiar with the company's equipment. Employees who have worked for a particular company over the years know they will return to familiar circumstances. In any event, to meet these employer and employee desires, Last determines which of the out-of-work members have worked for the company in the previous year and, in addition, whether they have worked for one or more years before that so as to have an established relationship with the company making the request. If they have, Last makes an effort to assemble the same crew as the company had in the previous painting season.

The Board recognized that in balancing all these factors, there is considerable latitude for discretion and the exercise of judgment on Last's part. The hiring hall was not operated on a "first in, first out" basis, and the union's by-laws formally authorized the exercise of the business agent's discretion. Nevertheless, the Board stated that neither the fact of discretion nor its exercise are, per se, illegal. The question is whether that discretion had been abused. On the evidence, the Board concluded that the factors considered by Last when he made the impugned referral were reasonable and that he was acting in good faith. In the circumstances the Board held that there had been no breach of section 69. *John Cooper*, |1984| OLRB Rep. Jan. 6.

Effect of non-pay due to innocent mistake

The evidence before the Board in this application for certification established that a collector for the union, who was not in charge of the organizing campaign had, through an innocent mistake, failed to collect a dollar from a person signing an application for membership. The issue was whether in the circumstances, the Board ought to reject only the one tainted card or all of the cards collected by the collector in question.

Reviewing past decisions dealing with non-pay in different circumstances, the Board distinguished between its approach in a situation where the rejection of all of the cards of the collector results in the direction of a representation vote as opposed to automatic certification and a situation where the result is outright dismissal as opposed to a vote. In the former situation, the Board will be more inclined to reject all of the cards and direct a vote. In the latter situation, the Board will be reluctant to reject all of the cards and dismiss the application, because any remaining doubts can be resolved by the direction of a vote. The case before the Board, fell into the latter category. This factor, combined with other circumstances such as that the mistake was an innocent one committed by a collector not in charge of the campaign caused the Board to reject only the tainted card and a representation vote was directed. *Frankel Steel Limited*, |1984| OLRB Rep. Jan 28.

Employer's refusal to fire employees expelled from union membership not unlawful

In 1982, the respondent was a participant in a form of coalition bargaining. In accordance with an agreement between the participating employers, when one employer was subjected to strike action, the other employers, including the respondent, locked out their employees. The evidence indicated that after the lockout, the respondents' employees engaged in picketing. On the day in question, three employees on picket duty, including the two interveners, were observed having, what the Board described as, "an entirely innocent conversation" with the President of the respondent company. Certain members of the union considered this conduct as a form of "strike breaking" and filed charges under the union's constitution. No efforts were made to investigate or discuss the concerns with the interveners.

The interveners were put on trial two months after the alleged incident. The interveners wrote to the union denying any impropriety on their part but did not appear at the trial. The charges were upheld and each intervener was subjected to a three month suspension and a fine of $50. This decision of the trial board having been confirmed at a membership meeting, the interveners were notified that if the fine was not paid they would face expulsion from the union. The interveners refused to pay the fine and after a further warning they were expelled from union membership and a demand was made of the employer that they be discharged.

The employer took the position that the terms of the collective agreement did not require him to discharge the interveners so long as their dues were properly deducted, and no demand had been made that the employer deduct the amounts of the fine from the interveners' wages. The union contended that the employer's refusal to discharge the grievors was an attempt to wilfully interfere with the internal affairs of the union and to subvert the union's constitutional requirements.

The Board stated that it did not have to conclusively determine the meaning of the provision in the collective agreement, a dispute relating to which should be resolved through arbitration. In order to dispose of the matter, it was sufficient for the board to be satisfied that the respondent's interpretation of the agreement was bona fide, arguably right and reasonable and not motivated by any intention to interfere with the internal affairs of the union. In these circumstances the Board held that no unfair labour practice had been made out. In the course of reaching its unanimous decision the Board stated that the characterization of the interveners' conduct as "strike-breaking" was "ridiculous" and noted that the union had done nothing to investigate the exact nature of the interveners' alleged misconduct before deciding to lay charges. The Board also commented that it was noting "the interesting process in which the functions of investigator, prosecutor, judge and jury are combined in one group of individuals." *Sumner Press*, |1984| OLRB Rep. Feb. 386

Union in breach of settlement of unfair representation complaint

As part of a re-organization of hospital services in the Town of Hawkesbury, the General Hospital took over another publicly funded hospital known as the Smith Clinic. The local of the Canadian Union of Public Employees ("CUPE") that represented employees of Smith Clinic entered into an agreement with General Hospital that had the effect of putting former Smith Clinic employees at the bottom of the General Hospital seniority lists for purposes of promotion, lay-off andd shift scheduling. Eighteen former Smith Clinic employees filed a complaint before the Board alleging inter alia that their former union local and the CUPE local representing them presently as employees of General Hospital, had breached the fair representation duty. This complaint was settled by the parties in writing. The instant complaint alleged that the said settlement had been violated by the union, contrary to s. 89(7).

The settlement contemplated that there would be two union meetings at which national representatives of CUPE would urge acceptance of integrated seniority and that a vote of the membership would follow. The evidence disclosed that two additional meetings were held prior to the vote by local union officials, who were all employees of General Hospital, at the home of an employee. Former employees of Smith Clinic were not invited to these meetings. When the vote was held the result was in opposition to integrated seniority.

The Board concluded that these meetings were union meetings and not social gatherings and that the effect of the meetings was to indicate to those present that the union executive opposed integrated seniority. Since the settlement envisaged only two meetings at which integrated seniority was to be recommended, the Board unanimously concluded that the settlement had been breached.

On the issue of remedy Vice-Chairman Springate was not prepared to simply impose integrated seniority. In this regard he was of the view that it was far from clear that integrated seniority would have been accepted had the vote proceeded in accordance with the agreed to minutes of settlement. Quite apart from the relative numbers involved, he felt it highly probable that if the two meetings in question had not been held, individual General Hospital employees would have lobbied against integrated seniority without in any way breaching the minutes of settlement. The Vice-Chairman was also concerned that to deem integrated seniority would impose a result upon a sizable number of General Hospital employees who were not involved in attempts to undermine the terms of settlement. Given these circumstances, he concluded that the most appropriate remedy was to set aside the settlement and allow the complainants to litigate their original complaint. However, the two Board Members, forming the majority on the remedial aspects, disagreed. They concluded that the remedy should be to direct the parties to conduct their affairs as if the vote had been in favour of integrated seniority. "In our view, it is appropriate that those who in bad faith sought to undermine the purpose of the vote end up with the very result they sought to avoid," they wrote. *Hawkesbury & District General Hospital*, [1984] OLRB Rep. Feb. 259.

Application for religious exemption based on union's pro-abortion stand premature

The applicant, a teaching master at Georgian College applied for an exemption from paying certain dues to OPSEU under section 53 of the *Colleges Collective Bargaining Act*. His application was prompted by the formal pro-abortion stand adopted by his union. His concerns began when OPSEU published an article which he felt took a pro-abortion stand, in the union's newsletter. The article also noted that the OPSEU caucus at the OFL's annual convention in 1982 had voted in favour of a pro-abortion resolution. The applicant also opposed the debating and adoption of pro-abortion resolution at OPSEU's own convention, which in essence resolved that three columns be prepared for publication in the OPSEU News to "explain the problems women face in obtaining a safe, legal abortion; and the reasons why it is important for the trade union movement to take a public stand on this issue."

The applicant took the position that he was opposed to the union dealing with the issue of abortion at all. However, he conceded that the "freedoms" of other union members entitle them to use the union newsletter as a forum for discussion, so long as the newsletter is not used to promote one point of view over another. He was able to reconcile his religious beliefs with everything except the actual expenditure of funds on pro-abortion activities. Therefore, the applicant limited his claim for exemption only to that portion of his dues, however minor, fairly attributable to pro-abortion expenditures. He submitted however, that if such apportionment is not possible, he had no option but to seek a total exemption.

OPSEU, while conceding that this particular applicant's beliefs were "religious", contended that the application must fail because an exemption was available not to those opposed to a particular union, but only to those opposed to trade unions in general. The Board, examining the statutory language and its prior decisions, rejected this argument. The Board also stated that there is nothing in the section, or the Board's jurisprudence, to suggest that an applicant's objections must extend to all activities of a trade union.

On the merits, the Board held that the convention expenditures attributable to the debate on the "abortion" resolution fell within the area of freedom of speech, which the applicant had conceded. Thus, only the last part of the resolution authorizing the expenditure of funds for preparation of three pro-abortion articles remained to be considered. The evidence in this regard was that neither time nor funds had yet been expended on the proposed articles, and that in fact no decision had yet been made on the form which the articles would take. Therefore, the Board found that the application before it was premature. It was dismissed without prejudice to the applicant's right to re-file should further developments warrant it. *Georgian College of Applied Arts and Technology*, |1984| OLRB Rep. Feb. 247.

Refusal to grieve mandatory referral of employee to alcohol rehabilitation program not unfair representation

The union and the employer operated jointly a program for dealing with unsatisfactory work performance in which alcohol and drug abuse are factors. Employees may request to go on the program (a voluntary referral) or may be given a mandatory referral. A mandatory referral was considered as an alternative to disciplining of an employee whose work performance was found to be unsatisfactory due to alcoholism or drug abuse. The program was an attempt by the union and the employer to treat alcohol and drug abuse as a health problem and to remove these from the mainstream of discipline. The employer had agreed to inform the union in writing prior to making a mandatory referral of the reasons for it and to keep the union fully informed of each step subsequently taken in the program. Thus the union was able to grieve if it disagreed with the appropriateness of a mandatory referral and if the employer failed to properly apply the steps of the program. In return, the union undertook that it will not grieve on behalf of an employee who has been given a mandatory referral or has been disciplined or discharged for failing to follow the program after a mandatory referral, so long as the employer has applied properly the steps of the program. An employee whose termination was not grieved by the union because of its policy decision alleged that the union had breached its duty of fair representation.

The Board held that if the policy resulted in different treatment of employees disciplined for unsatisfactory performance depending on whether alcohol was a factor, there are cogent labour relations reasons for the difference. The union considered the program to be of general benefit for bargaining unit employees in that alcohol and drug problems were treated as a disease rather than matters for immediate discipline. The union, along with the employer accepted the expert advice that for the program to be successful, the employees must believe their referral to be a "last chance" to correct the problem. Filing of grievances for employees who were disciplined for refusing or failing to comply with the terms of the referral would be inconsistent with that concept. The Board was satisfied that, when making the policy decision, the union sought to balance the value of the program to all unit employees and the need to enhance its effectiveness for the employees who would be referred to it by supporting the constructive coercion concept on which it operates. Therefore, the Board held the union did not breach section 68 when it made the policy decision.

The Board also found no breach in the application of the policy to the complainant's termination. While the union had failed to communicate to the complainant the policy reason for not grieving, that defect was cured subsequently. The Board expressed concern that the proper procedures with respect to employees given mandatory referrals had not been followed by the union. By not confirming the alleged unsatisfactory work performance infractions and by not talking to the complainant, the union ran the risk of depriving itself of relevant information. Concern was also expressed that the complainant was not informed that the union would not file grievance if he failed or refused to comply with the terms of the program. However, the Board concluded that these failures did not make any difference in this case because the union would not have discovered anything which reasonably would have caused it to alter its decision not to grieve. Consequently the complaint was dismissed. *Ontario Hydro, re CUPE Local 1000 and Leo McMullen*, |1984| OLRB Rep. Feb. 323.

Whether employees deemed to be actually at work on application date

The union and the employer party to this certification application were in dispute as to whether or not four persons were to be counted as employees for the purpose of measuring the union's degree of support within the bargaining unit. Employees A and B worked on the application date for a very brief period before being laid-off. C arrived at work on the application date, but before reaching his work station, was advised that he was indefinitely laid-off. D was scheduled to work on the application date but called in sick. He was asked to come in and speak to the manager and when he did, was advised that he was indefinitely laid-off.

The Board held that A and B should be included in schedule A since they worked on the application date, even though for a brief period. C was also placed on schedule A in accordance with established Board policy that a person scheduled to work, who arrives at work expecting to work is counted even though he is laid-off without any work being performed by him. The Board, facing D's circumstances for the first time, stated that labour law policy must be balanced with administrative concerns. Applying this principle, the Board concluded that a person scheduled to work, but who does not perform any work due to illness, should be placed in schedule D, even though he visited the workplace on the day in question. *Holiday Juice Ltd.*, |1984| OLRB Rep. Feb. 277.

Failure to disclose plant closure: Damages computed by the Board

In a decision dated September 30, 1983 the Board found that the company had contravened its duty to bargain in good faith by failing to disclose a plant closure during negotiations. The parties having failed to agree upon appropriate remedies, further hearings were held in this regard and a decision dealing with the remedial aspects issued.

Reviewing the pattern of bargaining between the parties and the facts surrounding the particular set of negotiations in question, the Board concluded that, had the company disclosed the intended closure, the union would have achieved some greater relief for the affected employees than was contained in the agreement actually negotiated. The Board felt that the union's focus would have been on improved severance pay and priority in hiring. While the union may have sought severance pay equal to what was paid to salaried employees, the Board concluded that the company would not have, for various reasons, acceded to such a demand. The Board concluded the loss of each grievor to be 25% of the difference between what the grievor received on severance and what was paid to a salaried employee. The Board also concluded that the union would have achieved some form of access to new jobs at the company's other Ontario locations, for the affected Hamilton employees. Thus the Board directed that, subject to the prior recall rights of employees at other locations on lay-off, the company offer new positions at its other Ontario plants to those grievors who refrain from immediately taking the severance payment directed by the Board in order of seniority. This direction was to be in effect for a period of one year from the date of the decision. On the acceptance of a job at another plant, a grievor was to be accorded a three month training

period. If a grievor is unable to perform the job at the end of the training period, he may be terminated and paid the severance entitlement under the decision. Further if a grievor, who accepts a new job at another location, is terminated within one year of hiring for a reason other than his own conduct, he must be paid his severance benefits as calculated by the Board's decision. If any grievor who registers himself does not find employment at another Ontario plant of the company within one year, he must be paid his severance entitlement. Seniority can be carried to the new location only for purposes of benefit entitlement but not for competition with employees of those locations. At any time during the one year period, a grievor may waive his claim to priority of hiring and elect to take the severance benefits.
Consolidated Bathurst Packaging Ltd., [1984] OLRB Rep. Mar. 422.

Union officials holding key positions with employer: Certification prohibited by s.13

The Seafarers' International Union of Canada sought bargaining rights with respect to certain employees of the Seafarers' Training Institute, a non-profit corporation formed for the purpose of operating a school for the training of seamen. The President of the union, Mr. Roman Gralewicz, was also the President of the employer. The area Vice-President and the Secretary-Treasurer of the union also served on the employer's Board of Directors. It was the Secretary-Treasurer of the union who signed the Form 9 and his son was the collector of the cards filed in support of the application for certification. The individual who filed the certification application and who testified that he would be directly responsible for negotiating, reported to and was under the authority of Mr. Gralewicz.

The Board, emphasizing the need for an arm's length relationship between "two sides" for collective bargaining and citing several provisions of the Act which recognize this need, held that granting a certificate in the circumstances would be contrary to s.13. The application was dismissed.
Seafarers' Training Institute, [1984] OLRB Rep. Mar. 518.

Merger of unions upheld by Board

The Board dealt with an application under s.62 by the UFCW, wherein it claimed that it was the successor of Kraus Carpet Employees Association by reason of a merger with the latter. The employers contended that there was no valid merger. It argued, reference being made to *Astgen* v. *Smith*, that the association needed unanimous authorization to merge. In the alternative, it was contended that the procedures taken to effect the merger were inadequate in that in a single vote, the constitution of the association was amended to permit a merger and the merger was approved by the membership. It was argued that the amendment of the constitution to permit a merger and approval of the merger itself are two different things, which cannot be combined in a single vote.

Examining the nature and functions of a modern trade union, the Board held that, while at common law a trade union may still be only a voluntary association, under the *Labour Relations Act*, it is more than that. Under the Act and its definition, the collective bargaining purpose was the critical requirement of a trade union. While the constitution was not irrelevant, it did not have the central role as it did at common law. Turning to the Association's constitution, the Board found nothing in it to prevent a merger. The only relevant constitutional provision was the one respecting amendments. Neither its terms nor the association's past practice nor the evidence before the Board suggested that the provision must be limited so as to exclude an amendment to permit a merger. The *Labour Relations Act* does not suggest that one should infer or read into a union constitution some unstated but fundamental objects which limit the union's freedom of action. The Board stated that it could see no industrial relations policy why the association in this case should be saddled with the requirement of unanimity, which its members have not undertaken and which would frustrate the wishes of a significant majority.

Turning to the issue of the adequacy of the procedure followed, the Board concluded that the association had given its members ample notice of the upcoming meeting. Given the unprecedented interest and debate generated by the merger issue, (the employees also participated in the debate) the Board had no doubt that the members knew precisely what they were voting for or against, namely, a merger with the UFCW. Under the circumstances, the Board was satisfied that the vote to merge with UFCW reflected the considered opinion of 2/3 of those who cast ballots and more than a majority of the association's total membership. The vote on the constitutional amendment and merger was explained to the members and regarded as a single process and there was no evidence of any confusion. While stating that it would have been wiser to separate the constitutional amendment and merger issues, the Board could find nothing in the constitution of the association that prevented these two related issues being dealt together, nor could the Board find the slightest suggestion that had the issues been separated the result would have been any different. On the totality of the evidence the Board declared that it was satisfied that UFCW had acquired the rights, privileges and obligations under the Act of the association. *Waterloo Spinning Mills Ltd., etc.*, |1984| OLRB Rep. Mar. 542.

Full disclosure made during negotiations — Contracting out not unlawful

The employer, who already operated four apartment buildings in Metro-Toronto purchased two other adjacent apartment buildings on Balliol Street, Toronto, in June 1983. A new general manager was hired, and some two months before the filing of the application for certification and well before the advent of the union, the employees at these newly acquired buildings were notified that the operation was under review and that no one's job was guaranteed. The manager was instructed to explore the feasibility of contracting out cleaning and maintenance work as a cost cutting device. In September, 1983, the union was certified and notice to bargain given. Initial bargaining began in November when the union tabled its proposals and a further meeting was set for mid-January.

In the meantime, the employer received quotations from outside contractors, which represented significant savings from the existing costs for cleaning and maintenance. In December, by letter, the employer notified the union of its decision to contract out cleaning and maintenance. This decision did not affect the resident superintendents at the two buildings who fall within the bargaining unit. The union did not respond to this letter. When, at a subsequent negotiation meeting, the employer reiterated its decision to contract out, the union walked out and the instant complaint was filed alleging bad faith bargaining and contracting out for anti-union reasons.

The union argued that the employer was obliged to fully discuss its decision to contract out, which it failed to do. It was further alleged that the employer had misled it by including a wage rate for cleaners in its proposal. The union contended that from these facts, the Board should infer that the contract out was motivated by anti-union considerations. Having regard to the timing of its decision to review its operation, to the bona fides of that review and to the cost savings accruing to it, the Board was satisfied that the decision to contract out was not made for anti-union reasons.

On the allegation of bad faith bargaining, the Board held that the union's letter of December satisfied the requirement to disclose and that in the face of such notice, the tabling of wage rates for cleaners could not be seen as an attempt to mislead. The Board contrasted this case with *Westinghouse* and *Sunnycrest Nursing Homes*, where the employer had failed to disclose its intentions. "It was incumbent upon the union to seek clarification of that notice, if clarification was required, and to fashion an appropriate bargaining response to deal with it" the Board said. The Board noted that the company was prepared to bargain and to conclude a collective agreement on the basis of the terms that were being discussed and that negotiations terminated when the union walked out after being informed that the employer stood firm in its decision to contract out. In the circumstances the Board found no breach of the bargaining duty by the employer. *Curtis Property Management Ltd.*, |1984| OLRB Rep. Mar. 443.

Union seeking craft unit failing "commonly bargain separately and apart" test

The IBEW, Local 1687, applied for bargaining rights of a group of maintenance electricians employed by a mining company in Timmins and relied on the provision for craft units in section 6(3). The Board analysed section 6(3) as follows:

> There are three conditions which a union must meet in order to bring itself within the craft unit provisions of section 6(3):
>
> 1. The group of employees whom the applicant seeks to represent must be employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from other employees;
>
> 2. The group of employees must commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts;
>
> 3. The application must be made by a trade union which pertains to such skills or craft.
>
> If those conditions are met, the Board is required to find the craft unit to be appropriate. Section 6(3) is mandatory.

The Board went on to state:

> "An examination of the statutory language indicates that it has been carefully drafted to preserve the status quo. It is a recognition of historical organizing patterns, rather than any general endorsement of craft bargaining unit. Those historical criteria are built right into the section itself, and must be satisfied before it has any application. Section 6(3) is available only *if* the group of employees whom the union seeks to represent *already commonly* bargain separately and apart from other employees; and only *if* the applicant trade union has traditionally represented employees with those skills. Both conditions require the Board to look to the collective bargaining system for historical precedent to establish that the separate bargaining is already "common", and that the union's representation of these employees is in accordance with "established practice". These conditions effectively preclude the development of new craft unions and, in our view, limit the extension of craft bargaining patterns beyond their traditional boundaries. It is also interesting to note that even if these criteria are met, the section need not

be applied where the union seeks to "carve-out" a craft group from an existing bargaining unit. This latter qualification is legislative recognition of the bargaining problems which might result from multiplying the number of bargaining units in an industrial enterprise; and whether fragmentation arises because the system grows in a piecemeal fashion or is subsequently carved up, the industrial relations problems are the same."

Based on that analysis the applicant union was required to put before the Board, "a coherent body of collective bargaining experience to demonstrate that it *commonly* bargains on behalf of" electricians, separately and apart from other employees in the industry in which the application is made (i.e. mining) or in related industries or at least, if not in the particular industry in question, in the collective bargaining system as a whole.

Examining the collective agreements to which the IBEW was party in the various industries, in the United States and Canada, the Board found that, outside of the construction and related industries, IBEW's presence as representatives of electricians or maintenance electricians was minimal. The Board concluded that even assuming that the group of employees in question can be described as the craft of "electricians" or "maintenance electricians", the union had failed to establish that it *commonly* bargained for such group separately and apart from other employees. The Board stated that the evidence disclosed that the union's craft bargaining practice was "isolated, sporadic, unrepresentative and decidedly *uncommon*". Therefore the applicant was held not entitled to a separate craft bargaining unit under section 6(3). *Kidd Creek Mines Ltd*, [1984] OLRB Rep. Mar. 481.

CONSTRUCTION INDUSTRY DECISIONS

Union liable in damages for unlawful strike caused by its officer

In this construction industry grievance, the Board was faced with the issue of the liability in damages of a trade union for monetary loss resulting from an unlawful strike caused by a union job steward in breach of a no-strike clause in the collective agreement.

The evidence indicated that the job steward of the Ironworkers, Local 786, took issue with the employer and officers of his trade union regarding the assignment of certain work by his employer to other employees who were millwrights and represented by another trade union. When the employer continued the assignment, the steward caused the Ironworkers to walk off the job.

Having concluded that the circumstances satisfied the definition of "strike" in the Act, the Board reviewed and adopted arbitration jurisprudence which holds a trade union vicariously liable in damages for breaches of a no-strike clause by its officials. Turning to the provisions of the collective agreement dealing with the functions a job steward, the Board had no difficulty concluding that a job steward represents the interests of the union and was an official and agent of the union.

The Board adopted the reasonable standard of conduct pronounced by the arbitrator in *Re Polymer Corp. Ltd.* (1958) 10 LAC 31 (Laskin), p.39 that a union "will not through its proper officers, sanction or direct or condone or encourage stoppages by any person in the bargaining unit". Applying that standard to the facts before it, the Board found that the job steward in question had instigated the strike of the applicant's ironworker employees. The Board noted that it may have found the union liable in damages even in the absence of the job steward's complicity in the strike because it had doubts whether union officials, given their experience, acted with appropriate diligence to avert a strike.

Relying on *Re Polymer* for the proposition that arbitrators have the authority to award damages for proven losses attributable to an unlawful strike, the Board proceeded to assess the losses suffered by each of the applicant employers as a result of the unlawful strike and directed the union to pay the amounts so assessed to the applicants forthwith. *Dominion Bridge Company Limited, et al and Ironworkers, Local 786 et al*, [1983] OLRB Rep. Apr. 503.

Local practice estopping union from enforcing strict terms of provincial agreement

The respondent employer, based in Kitchener, was operating an acoustic and drywall installation business in the industrial, commercial and institutional (I.C.I) sector of the construction industry. The employer was bound by the current provincial collective agreement with the carpenters' Council. Locals 1316 and 765 were both members of the Council. Local 1316's geographic area is based in London, and includes Owen Sound. Local 785 is based in Kitchener.

The employer undertook projects in Owen Sound, and made use of employees who were members of Local 785. Owen Sound, however, is in Local 1316's geographic area. As a result, Local 1316 applied to the Board, pursuant to section 124 of the *Labour Relations Act*, to arbitrate its grievance with respect to this issue. The parties were agreed that Article 5 of the Provincial Agreement requires the employer to make use of Local 1316 members for the Owen Sound project. The only issue was whether Local 1316 was estopped from asserting its rights under the collective agreement.

The evidence suggested that there was a long-standing practice in the Kitchener area by which acoustic and drywall contractors in that area used carpenters exclusively from Local 785 when undertaking work in Local 1316's geographic area. There was no evidence that Local 1316 or the council of carpenters' unions ever complained about this practice. The employer stated that this practice had been going on for eighteen years without protest from anyone. The employer also stated that it was financially advantageous to use Local 785 members in Owen Sound, as transportation costs were lower and wages were somewhat lower than the rates for Local 1316 employees. The employer considered these factors when bidding for the project.

The Board considered the doctrine of promissory estoppel, and concluded that despite some doubts expressed by the Divisional Court in *Re Hospital Commission, Sarnia General Hospital and London District Building Service Workers' Union, Local 220, S.E.I.U.*, [1973] 1 O.R. 240 as to whether the doctrine could be applied in labour arbitration proceedings that doubt was removed by the same Court in *C.N.R. Co.* v. *Beatty*, (1981) 34 O.R. (2d) 385. The Board also noted that it has frequently applied the doctrine in other section 124 applications.

The Board noted that three conditions are necessary for a finding of estoppel: first, there must be a representation by words or conduct intended to be relied on by the party to which it was directed; second, there must be some reliance in the form of some action or inaction; and third, there must be detriment resulting from the reliance. The Board noted that acquiescence or inaction can have the effect of a "representation", and there are good labour relations reasons for this conclusion. Local 1316 acquiesced in the employer's practice of employing Local 785's members in Local 1316 territory. Further, the employer relied on this acquiescence, by bidding in good faith on the obtained work at a number of projects on the basis of the Local 785 wage, travel and board payments set forth in the Appendix to the collective agreement. Finally, the employer relied on Local 1316's representation to its detriment. If Local 1316 succeeded in this grievance arbitration, the employer would have to pay Local 785 members entitled to work on the projects by virtue of the collective agreement, the difference between the compensation specified in the Appendix for Local 785 and Local 1316. Furthermore, Local 1316 would have to be compensated.

The Board concluded that it would be inequitable to enforce the strict wording of the collective agreement. The grievance was dismissed. However, the Board commented that as the employer now had notice of Local 1316's objections, Article 5 of the agreement could be enforced by Local 1316 in respect of any projects subsequently bid upon by the employer in Local 1316's area. *Losereit Sales and Servicers Ltd.*, |1983| OLRB Rep. Apr. 569.

Whether employees are construction or non-construction employees

The trade union applied for certification of the employer's bargaining unit employees in the construction industry. An issue arose as to whether certain persons ought to be excluded from the bargaining unit. Three "service employees' were said to be construction labourers by the employer, but the union argued that they ought to be properly excluded from the bargaining unit. The evidence was that the three employees dealt essentially with the Hudac warranty for new homes. They primarily conducted inspections at regular intervals, and often dealt with the purchaser of new homes. If necessary, they effectuated any repairs that they could perform, and called in appropriate repair persons to carry out any other repairs. The trade union took the position that these employees did not carry out construction work, and ought to be excluded from the bargaining unit notwithstanding any concerns the Board might have with respect to the unit's fragmentation. The employer referred to the *PHI International Inc.* case, |1980| OLRB Rep. Dec. 1789, in which two labourers who continued to clean up and do repairs after the purchasers had taken possession of certain condominium units were included in the bargaining unit.

The Board held that the three "service employees" ought to be excluded from the bargaining unit. The employees, in the Board's view, were in fact service employees and not construction employees. The Board accepted the union's argument, and distinguished the *PHI International Inc.* case, *supra*, on the basis that the three service employees in the present case form a distinct and separate operation. *Nu-West Development Corporation Limited.*, |1983| OLRB Rep. May 692.

Board distinguishing between mandatory and voluntary trades in construction industry bargaining rights

This was a certification application in which the Board found that the appropriate unit should be one of glaziers and glaziers' apprentices. The evidence was that none of the three employees employed by the employer were certified tradesmen or apprentice glaziers. They had no qualifications and little or no experience as glaziers. Nevertheless, they were performing "glaziers' work".

The Board distinguished this case from *Irvcon Roofing*, where the Board refused to recognize persons who were not certified tradesmen as employees in a unit of sheetmetal workers. However, the sheetmetal trades was a mandatory trade in that under the *Apprenticeship and Tradesmen's Qualifications Act*, persons other than a certified tradesman were prohibited from working in the sheet metal trade. On the contrary, *Ontario Regulation 39* governing glaziers had the effect of making glaziers a voluntary trade in that they were exempted from the prohibition. Consequently, the Board held that the employees performing glaziers' work were employees in the unit despite the fact that they did not have any qualifications. *C.T. Windows*, |1983| OLRB Rep. May 627.

Bench warrant issued against witness failing to appear

The trade union appeared before the Board, in a referral pursuant to section 124 of the *Labour Relations Act* alleging that the respondent employer violated the collective agreement to which they were bound. The applicant advised the Board that it had subpoenaed two of the principals of the respondent company, and served them with the proper conduct money. Affidavits of service were produced as proof of service. Despite this, the two principals failed to attend the hearing. The applicant advised the Board that it would require the evidence of the two subpoenaed witnesses, and asked the Board to issue warrants for the arrest of the two witnesses.

The Board referred to sections 103(2)(a), 124(3) and 44(8) of the *Act*, in explaining the statutory power given to the Board to grant the applicant the relief requested. The Board referred to its decision in *Casabil Contractor Limited*, |1980| OLRB Rep. Sept. 1278. There, the Board was also confronted with the failure of subpoenaed witnesses to attend during a section 124 (then section 112(a) grievance arbitration). The Board in *Casabil* noted that the enforcement mechanisms contained in sections 12 and 13 of the *Statutory Procedure Act* (the "S.P.P.A") were not available to the Board, because by section 3(2)(d) of the S.P.P.A. that statute does not apply to arbitrators under the *Labour Relations Act*. The Board, during a section 124 hearing, sits as an arbitrator. Thus, the power contained in the Act is the only authority which the Board can rely on in issuing a bench warrant. The Act gives the Board the authority to enforce the attendance of a witness in the same manner as a court of record in civil cases. In Ontario, a court of record in civil cases has the authority to issue a warrant for the arrest of a person who has been duly served with a summons but fails to appear. The warrant is not punitive in nature, but is issued merely to ensure that the witness attends to give evidence. Finally, the Board in *Casabil* stated that a bench warrant will issue if the party seeking the warrant can establish two pre-conditions: first, that the witness was properly served with a summons and sufficient conduct money; and second, that the presence of the witness is material to the ends of justice.

The Board applied the test set out in *Casabil*, and concluded that the presence of the two subpoenaed witnesses would be material to the ends of justice. Warrants were therefore issued for the arrest of the two witnesses, directed to the sheriffs and other peace officers in the Province of Ontario. *Standard Insulation Limited* |1983| OLRB Rep. June 986.

Persons hired contrary to collective agreement not eligible to vote in termination application

The Board in this case considered a construction industry grievance, pursuant to section 124 of the *Labour Relations Act*, as well as an application by a group of employees for the termination of the Carpenters' Union's bargaining rights pursuant to section 57(2) of the Act.

The employer was active in the construction industry in the southern Ontario area. In 1970, the employer undertook some work in north-western Ontario, and entered into a voluntary recognition agreement with Local 1669 of the Carpenter's Union for that part of the Province. The Union held no other bargaining rights in respect of the employer's employees. The collective agreement arising from the 1970 voluntary recognition agreement expired in 1973, and was never renewed. In 1978 the Legislature amended the *Labour Relations Act* to provide for province-wide bargaining by trade. In 1980 a further legislative amendment introduced section 137(2) of the Act, which deems employers active in the ICI sector of the construction industry to have recognized affiliated bargaining agents in certain situations.

In a decision in March of 1982 (aff'd by the Divisional Court, Feb. 2, 1983), the Board held that by virtue of section 137(2) of the Act, the Carpenters Union held bargaining rights in respect of all of the employer's employees active in the ICI sector of the construction industry in Ontario. The Board and the Courts were of the opinion that section 137(2) had the effect of extending existing bargaining rights province-wide. Thus, the voluntary recognition agreement which the employer entered into with a local of the Union for a particular area of Ontario resulted in the Union having bargaining rights in all of Ontario. The employer had nineteen employees of whom only one was a union member. Twelve of these employees were hired prior to the Union's assertion of bargaining rights following the 1980 introduction of section 137(2); the remaining seven were hired subsequently. The employees, the evidence suggested, were unfavourably disposed to the Union. Nevertheless, they applied for membership in the Union following the Board's earlier decision. However, their membership applications were ignored by the Union, probably because the union feared that if they were admitted to the Union, they would be considered "employees" eligible to file and vote in a termination application.

The Board was required to consider two basic issues. First, section 57(2) of the Act stipulates that "|a|ny of the *employees* in the bargaining unit . . . may . . . apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit . . . " (emphasis added). The Board was required to decide which the nineteen *de facto* employees, were "employees" for the purposes of the termination application. The relevant provincial agreement required that only union members be hired. Can persons employed contrary to a union security provision be counted in considering a termination application? Second, the Board was required to deal with the Union's grievance. In this regard the union alleged that the employer was employing non-union labour, contrary to the provincial agreement.

The Board first considered the issue of who was an "employee" for the purposes of a termination application. The Board applied the following test: persons engaged by an employer to do work are not "employees" for the purposes of a termination application, if they were hired "knowingly" in violation of the collective agreement. Employees who were originally hired lawfully, on the other hand, must be considered "employees" for the purposes of a termination application. Applying this test, the twelve employees hired prior to the Union's assertion of bargaining rights following the 1980 legislative amendment which brought in section 137(2) were held to be "employees"; but the seven employees hired afterward were not "employees" as defined in section 57(2), and ought not to be considered in processing a termination application.

The Board then considered a number of Union arguments as to why the test enunciated in the Board's jurisprudence should not be applied. The Union maintained that none of the nineteen workers were "employees" for the purposes of section 57(2). The Union referred to the provincial agreement, and argued that a worker must be a union member to be considered an "employee". The Board rejected this argument, pointing out that the collective agreement was not specific in defining "employee". The Board noted that in another Board case, the fact that the term "employee" was defined in a collective agreement as involving union membership could not convince the Board to alter its conclusion that certain non-members were "employees" for the purposes of section 57(2).

The Union also argued that the requirement that the twelve employees hired prior to 1980 be given reasonable notice to join the union prior to discharge may apply in an industrial context, but not in a construction context. The Union pointed to the hiring hall process in the construction industry as warranting a different legal conclusion. The Board rejected this argument, and noted that the *Blouin Drywall Contractors Ltd.* (1975), 8 O.R. (2d) 103 (Ont. C.A.), cited by the Union in support of this argument, involved construction industry employees wrongfully hired from the outset. The Union also submitted that the twelve employees hired prior to 1980 in fact had reasonable notice to join the Union, as a result of the 1982 decision concerning the Union's bargaining rights with the employer. This argument was rejected by the Board as well. The Board pointed out that the 1982 decision merely stipulated that the Union *may* require the dismissal of the non-union employees. Further, the employees applied to join the Union, but their applications were refused. Finally, the Board referred to the fact that the earlier decision had been stayed by the Divisional Court.

The Board therefore upheld its view that the twelve employees hired prior to the Union's assertion of bargaining rights following the 1980 legislative amendments were "employees" whose views were to be considered in processing the application for termination. *Inducon Development Corporation*, [1983] OLRB Rep. July 1038.

Hiring halls — arbitrary and discriminatory job referrals

A union member brought a complaint under section 89 of the *Labour Relations Act*. The complainant alleged that the distribution of work assignments by a union local hiring hall was conducted in such a way as to be arbitrary, discriminatory and in bad faith contrary to section 69 of the Act and further that the respondent union and its officers brought intimidation and coercion to bear against him contrary to section 70 of the Act.

Evidence showed that there was substantial confusion in the minds of the general membership as to the precise rules and practices of the hiring hall. There were no copies of the hiring hall rules posted. Members were often frustrated in attempts to obtain copies of the union constitution. There appears to have been considerable doubt as to whether such rules existed at all. The Board found that the complainant was passed over numerous times. Work assignments were often granted to those whose names followed the complainant's on the "out of work list" or to union members who had not in fact placed their names on the list at all. Moreover, a purported hiring hall rule that stated that members who quit or refused work assignments could not register on the out of work list for 7 days was either waived or enforced on the whim of the local executive. Similar irregularities existed with regard to the job classifications, where often, employees who had little or no experience in a particular classification were sent to work in such positions.

The Board found that behind many of these irregularities, there existed nepotism and internal union political strife. It found instances in which relatives of the union executive were given jobs in the hiring hall administration itself, while others received preferential treatment in job assignments. Conversely, former electoral opponents (as was the complainant in this instance) as well as disabled employees were discriminated against. The Board found that the favouritism given relatives of the union executive, the "out of order" job referrals and the vague and inaccessible classification system were clearly arbitrary and discriminatory and in violation of section 69 of the *Labour Relations Act*. In coming to this conclusion, the Board noted that union locals and hiring halls are not to be treated as family businesses. The Board went on to state that the union and hiring hall "exist pursuant to statutory rights of exclusive agency established under the Labour Relations Act. The exercise of those rights is a trust to be administered fairly and objectively for the benefit of all members". The Board, however did not find any breach of section 70 of the Act. While there was evidence of arbitrary and discriminatory job referrals, there was nothing to suggest the union executive attempted to coerce or intimidate union members.

The remedies directed by the Board included, the posting of an employee notice in both English and Italian, a cease and desist order and the publication, posting and distribution of a list of hiring hall rules to be presented to the membership for "explanation, discussion and adoption". The Board also directed that a meeting be convened of the membership to adopt "classifications, standards and procedures" for the hiring hall and that an independent auditor be appointed, by agreement between the respondent and complainant to inspect on a periodic basis for 2 years, the administration of the hiring hall rules and procedures. The Board further directed that the executive committee draft recommendations for the establishment of a system by which disabled workers may be referred to jobs they are able to perform and that copies of the constitution and by-laws be made available to all members requesting copies. The respondent was directed to compensate the complainant for all wages and benefits lost as a result of its violation of section 69 of the *Labour Relations Act. Joe Portiss* Re *Labourers' International Union of North America, Local 1089* |1983| OLRB Rep. July 1160.

Section 124 applying to grievance even though some of the work not in construction industry

In this construction industry grievance complaint, pursuant to section 124 of the *Labour Relations Act*, the predecessor employer which was bound by a collective agreement purported to lay off its employees. Another corporation was formed, and the laid-off employees were asked to apply for employment with this new corporation. The Board, in an earlier decision, declared that the new corporation was a successor employer, as a sale of a business within the ambit of section 63 had occurred. Notwithstanding this declaration, the successor employer failed to abide by the provisions of the collective agreement with respect to the terms and conditions of employment of its employees. As a result of this failure to abide by the agreement, the applicant trade union filed a construction industry grievance with the Board.

The first issue to be considered was whether the Board had jurisdiction to hear the grievances, pursuant to section 124 of the Act. The evidence indicated that not all aspects of the work covered by the collective agreement fell within the "construction industry", as defined in section 1(1)(f) of the Act. Some of the work, including the service and maintenance of electrical equipment, did not fall within the definition. The arbitration procedure in section 124 applies to "an employer" and "a trade union" as defined by section 117 of the Act. Section 117 defines "employer" as "a person who operates a business in the construction industry", "trade union" is defined as a "union that according to established trade union practice pertains to the construction industry." The issue was whether the arbitration procedure set out in section 124 applies to collective agreements which cover both construction and non-construction work.

The Board held that section 124 applied in the circumstances, and that it therefore had jurisdiction to consider the grievances. There was no doubt that the applicant was a "trade union" within the meaning of section 117 of the Act. There was also no doubt that the employer operated a business in the construction industry, also required by section 117. The definition of employer the Board observed, is not limited to persons who operate a business *exclusively* in the construction industry. Moreover, the Board noted that all of the grievors were "employees" within the meaning of section 117, since all of the workers who were not engaged exclusively in on-site work were commonly associated in their work or bargaining with on-site employees. While the grievors could have filed grievances pursuant to the collective agreement as opposed to section 124, an application pursuant to section 124 was preferable, because grievances primarily related to construction work ought not be subjected to arbitration procedures of a type which have generally been recognized to be ill-suited to the needs of the construction industry. The same reasoning applies to the argument that the grievors ought to have applied for expedited arbitration, pursuant to section 45 of the Act. Moreover, the Board noted that the respondent employer made no objection to the Board's jurisdiction under section 124 until the time limit set forth in section 45(2) had expired.

Alternatively, the Board concluded that it had jurisdiction under the unfair labour practice procedures provided by section 89 of the Act. Section 50 of the Act provides that a collective agreement is binding upon the employers and trade unions who are parties to the agreement. Section 63(2) provides that, until the Board otherwise declares, a successor employer is bound by the predecessor's collective agreement" as if he had been a party thereto". Thus, the successor employer's failure to honour the collective agreement was a violation of sections 50 and 63(2), and could be enforced by section 89 of the Act. The fact that the complaint was not styled as a section 89 application should not preclude the Board from considering it as such. The Act ought to be construed liberally and without technical formality.

Having found that it had jurisdiction to consider the grievances, the Board had to consider the extent of liability on the successor employer resulting from its collective agreement violations. The employer argued that the grievors had a duty to mitigate their damages. Thus, in the employer's submission, those grievors who did not apply for employment with the successor corporation were not entitled to any compensation. The Board rejected this contention. There was no obligation on the grievors to apply for new employment. The entire scheme of requiring employees to re-apply for employment was a transparent device adopted for the express purpose of jettisoning the collective agreement and the union's bargaining rights. The grievors were not obligated to apply for what they were legally entitled to. Moreover, the Board noted that the grievors were told that they had a possibility, only, of employment on a sporadic basis with the successor business at terms and conditions of employment inferior to that provided for in the collective agreement.

The successor employer also argued that its liability in respect of the grievances ought to extend back only to the date on which it received the Board's earlier decision declaring it the successor employer. The union's position, on the other hand, was that the employer's liability ought to extend back to the date of the lay-offs. The Board rejected the employer's position. According to the Board, section 63(2) of the Act applies to bind a successor employer to a collective agreement "until the Board otherwise declares." Thus, the successor employer was obligated to abide by the provisions of the collective agreement, even in the absence of a section 63 declaration proclaiming that a successorship had occurred.

The successor employer argued that the grievances were untimely, as the filing of the grievances with the Board exceeded the five day time limit provided for in the collective agreement. The Board held that the grievances were in fact timely. First, the Board concluded that the five day limit did not apply to such collective agreement disagreements, as a matter of contractual interpretation. Second, even assuming that the five day limit was applicable, and was mandatory as opposed to directory, the Board concluded that this was an appropriate case to extend the time limits, as permitted by section 44(6) of the Act.

Finally, the employer argued that had it not been for the establishment of a non-union successor employer, union wage rates would have meant that none of the grievors would have been employed, and that therefore the grievors would claim no real loss. This argument, too, was rejected. The evidence upon which the argument was based was strictly hearsay, the Board noted. Moreover, as a matter of labour relations policy, the Board concluded that a party which has breached its obligations under a collective agreement cannot attempt to escape liability for such breaches by asserting that since it only obtained the work in question by disregarding its collective agreement obligations, the trade union and its members could not claim any loss in respect of that work. If such a defence were available, any employer could proceed to ignore with impunity its wage rate and other collective agreement obligations. In the Board's view such an approach is utterly inconsistent with the provisions, spirit and intent of the *Labour Relations Act*. *Carroll Electric (1982) Limited*, [1983] OLRB Rep. Aug. 1282.

Whether respondent employer of grievors

A number of issues, including whether the applicant trade union and the respondent company were bound by a collective agreement, came before the Board. Before determining these issues, the Board had to determine whether the respondent was the employer of the employees who had grievances pursuant to the alleged collective agreement.

The respondent company entered into an agreement with the board of directors of a non-profit corporation desiring to construct a senior citizen's home. By the terms of the agreement, the respondent provided much of the management on the construction site for the senior citizen's home. In pursuance of this agreement, the respondent contracted for the supply of employees from Employment Canada under the terms of a federal program for the unemployment and disadvantaged. The respondent assigned all work, determined whether the quality of the work was acceptable, and in at least one instance terminated an employee. The directors of the non-profit corporation had no on-site involvement with the work at the project. The employees perceived the respondent to be their employer.

The Board referred to its seven-point test in determining who the true employer was. The purpose of the test, the Board pointed out, is to look beyond the form and appearance of employment relationships to their realities. The seven criteria the Board looked at were:

(1) The party exercising direction and control over the employees performing the work.
(2) The party bearing the burden of remuneration.
(3) The party imposing discipline.
(4) The party hiring the employees.
(5) The party with the authority to dismiss the employees.
(6) The party which is perceived to be the employer by the employees.
(7) The existence of an intention to create the relationship of employer and employee.

On the facts, the Board found that six of the seven criteria pointed to the respondent being the true employer of the employees. Only criterion (2), the party bearing the burden of remuneration, might be the exception. But even in this respect, the Board noted that the employees would look to the respondent to rectify any error in pay or any failure to pay wages owing, although the non-profit corporation had undertaken the ultimate burden for the respondent's payroll costs.

Based on the seven-point test, the Board concluded that the respondent was the employer of the grieving employees. The Board was not disuaded from its conclusion upon considering the argument that the respondent acted as employer only to receive the wage subsidy benefits of the federal program, for which non-profit corporations did not qualify. This reason alone did not mean that the respondent was in fact not the employer of record, and while not conclusive by itself of an employer-employee relationship for purposes of the *Labour Relations Act*, it did suggest such a relationship. Coupled with other indicators, the Board could not avoid the conclusion that an employer-employee relationship existed. *Thunderhawk Developments*, [1983] OLRB Rep. Aug. 1378.

Pre-judgment interest awarded on construction industry grievance award

In this construction industry grievance arbitration, held pursuant to section 124 of the *Labour Relations Act*, the Board found the respondent employer to be in violation of the collective agreement. As the employer failed to hire the grievors, as required by the collective agreement, the Board found that the employer was liable to the grievors for the back pay owing. The grievors, however, argued that they were also entitled to an interest payment to reflect the fact that a significant period of time (in this case, over a year and a half) had gone by since the point in time in which they ought to have been paid for the work they were not permitted to do. The employer opposed the idea of the Board including in its award an interest component. In the employer's view, awarding interest would be penal in effect and not merely compensatory. The employer also asserted that there should not be any award of interest where there is a *bona fide* dispute as to the interpretation or application of the agreement. Finally, the employer argued that the notion of interest is based upon the erroneous assumption that employees would invest the money which they receive in wages. The grievors, on the other hand, were of the view that interest is necessary to put them in the position that they would have been in had the employer complied with its contractual obligations.

The Board proceeded to consider the issue of interest by noting that the collective agreement, as is usually the case, did not address the remedial authority of the arbitrator at all. It merely provided, as required by section 44 of the *Labour Relations Act*, that the arbitration is to render a "final and binding" decision on the matters submitted to him for adjudication. Likewise, section 124 of the Act merely directs the Board to render a final and binding determination. Nowhere is the Board given specific guidelines as to remedy.

The Board noted that its remedial authority is neither limited to what the parties have expressly spelled out in their collective agreement, not is it necessarily defined by what a court or arbitrator might do in a common law or commercial context. The Board cited a recent Ontario Court of Appeal decision, in which that court clearly stated that arbitration boards ought not rigidly adhere to the procedures folowed by the courts, although those procedures might give arbitrators some guidance by way of analogy.

The procedures followed by commercial arbitrators must also be distinguished. In particular, the Board noted that labour arbitration is not solely the creation of the parties' agreement, nor have they opted for it as a matter of voluntary choice. Rather, the arbitration of grievances is a compulsory feature of modern labour legislation. For this reason it is a little artificial to speculate about what the parties must have intended.

The Board went on to review the relevant jurisprudence. In Professor Laskin's *Polymer* award of 1959, it was pointed out that an arbitrator's remedial authority can arise either expressly or by implication from the terms of a collective agreement. The wide remedial authority of arbitrators has been subsequently echoed by the courts. The purpose of an arbitration ought to be to put the grievor, so far as money can do (and perhaps subject to the limitations of reasonable foreseeability and mitigation), in the same position as he would have been in had there been no breach of the agreement.

Based upon these principles, the Board noted that a number of labour arbitrators have recently awarded interest as part of their awards. This attitude conforms to section 38 of Ontario's *Judicature Act*, which one arbitrator referred to as persuasive (although not binding) authority that public policy favours the awarding of pre-judgment interest. Although the *Judicature Act* applies to courts and not to arbitration boards, the public concern evidenced by that statute cannot be ignored.

There have been some recent arbitration decisions in which interest has not been awarded. The Board cited one such recent decision, but rejected its reasoning on the ground that it erroneously analogized consensual commercial arbitration with quasi-statutory labour arbitration. The fact that commercial arbitrators generally do not award interest was not seen by the Board as a convincing reason for denying such relief in labour arbitration. The Board also referred to an 1982 British Columbia Court of Appeal decision, in which that court favoured the awarding of interest in the context of commercial arbitration. In the Board's view, the policy considerations expressed by the B.C. court were equally applicable to an arbitration proceeding.

The Board concluded that its power to render "final and binding" award is undefined and unrestricted. An interest component is an important aspect of the measure of damages when an aggrieved party is able to establish that a sum of money should have been paid some months or years before. The interest component is not a penalty. It is part of the compensation for the loss incurred; that there is a cost or loss arising when money is not paid on time is obvious. Grievors are entitled to full compensation for all forseeable losses. Based on all of this, the Board concluded that it had the authority to award a sum to compensate the grievors for the loss of the wages and the use of those funds which they would have had if the employer had originally complied with the terms of the collective agreement.

The Board still had to determine how the loss could be calculated and qualified. On the one extreme, the Board could award the high rate of interest that is charged on outstanding credit card purchases. On the other extreme, the Board could award the much lower rate of interest which the wages would have generated had they been deposited into a savings account. The Board concluded that neither rate was desireable, and instead chose to apply a formula similar to that used in the *Judicature Act*, and by the Board in unfair labour practice cases. By this procedure, the Board would adopt the chartered bank's prime rate at the time the proceeding is filed. Accordingly, the Board took the prime interest rate applicable for the month in which the section 124 complaint was filed, and awarded the grievors interest on the earnings which the Board awarded to them. Interest was calculated effective from the date on which the grievors would have been paid for the work which they were improperly denied. *Beckett Elevator* [1983] OLRB Rep. Sept. 1391.

Ministerial exclusion of bargaining relationship makes collective agreement lawful notwithstanding province-wide bargaining

The complainant trade union local alleged that a number of respondents, including another trade union local, violated section 146 of the *Labour Relations Act*. In a designation order made by the Minister of Labour pursuant to section 139 of the Act, a number of locals, including the complainant, were designated as affiliated bargaining agents for the purpose of province-wide bargaining concerning construction labourers in the industrial, commercial and institutional sector of the construction industry. The provincial agreement, made pursuant to the designation order, declared the complainant local to be the exclusive affiliated bargaining agent for the Greater Metropolitan Toronto geographic area. Notwithstanding this, the respondent local had a collective bargaining relationship with the framework employers of formworker labourers in the Greater Metropolitan Toronto area.

Section 146(2) of the Act forbids all collective agreements purporting to affect employees already covered by a provincial agreement. The complainant contended that the respondent local and employers were in violation of section 146(2). The respondents argued that on the facts as alleged by the complainant, there was no *prima facie* case. The respondent local pointed to the fact that the relationship between itself and the formwork employees was specifically and clearly exempted from the Minister's employee bargaining agency designation order. The complainant, on the other hand, urged the Board to narrowly construe the exemption found in the designation order.

The Board held that the complaint failed to make out a *prima facie* case. Section 146(2) of the Act, the Board explained, is made subject to sections 139 and 145. The Minister of Labour's exclusion of the respondent local's collective agreement was made pursuant to section 139(2). Section 139(2) states that the rule in section 146(2) forbidding other collective agreements does not apply to exclusions made pursuant to section 139(2). The Board concluded that the ministerial exclusion, made pursuant to section 139(2), ousted the application of section 146(2). The complaint was therefore dismissed. *Verdi Forming Limited*, [1983] CLRB Rep. Oct. 1728.

Displacing union not required to take incumbent's unit in construction industry

The applicant trade union applied for certification in respect of a construction industry bargaining unit. The applicant sought to represent certain employees already represented by two incumbent trade unions. The bargaining unit of the incumbent unions included both cement masons and their apprentices as well as construction labourers. The applicant union, however, desired to displace the incumbents of their bargaining rights in respect of cement masons and cement masons' apprentices only. Specifically, the applicant sought certification in respect of all cement masons and their apprentices employed by the respondent employer in Ontario in the industrial, commercial, and institutional (I.C.I.) sector of the construction industry, as well as those employed by the employer in all construction industry sectors in a particular geographic area of the province.

The Board noted that the certification application, if successful, would require the Board to depart from its long established policy in displacement situations. That policy has traditionally led the Board to require the applicant in displacement cases to take the bargaining unit of the incumbent, even though the application concerns the construction industry, with all its craft implications. The Board's traditional policy was based on section 6(1) of the *Labour Relations Act*. However, the Board concluded that the Board's traditional policy probably conflicts with the policy implicit in section 144(1) of the Act dealing with applications for certification in the construction industry. In the instant case, the applicant was bound by a provincial agreement covering cement masons and their apprentices. To require the applicant to take construction labourers as well would mean that the applicant would have to assume bargaining rights for employees who would not be bound by its provincial agreement. The scheme of province-wide bargaining, the Board concluded, enabled the Board to exercise its discretion under section 6(1) so as to permit the applicant to carve out of the incumbent's unit a smaller bargaining unit which corresponds to the scope of the provincial agreement to which the applicant was bound. The Board, therefore permitted the applicant to apply for certification in respect of a unit of cement masons and their apprentices.

An issue arose as to whether a group of waterproofers were entitled to participate in the representation vote concerning the applicant's certification application. The incumbents argued that the waterproofers were entitled to vote, as they were performing work which falls within the jurisdiction of the applicant trade union, as set out in the applicant's provincial agreement. The applicant, on the other hand, argued that the waterproofers were construction labourers rather than cement masons. The issue was whether the Board would take as determinative of inclusion in a bargaining unit the jurisdiction set out in a provincial agreement.

The Board held that the jurisdiction as claimed in a provincial agreement is only one of a number of factors which should be looked at in determining whether employees fall within a particular bargaining unit. This, the Board commented, was a particularly necessary conclusion in circumstances such as the instant case, where work of a particular type is in effect done by a mixed crew of employees. In the present case, the waterproofers could generally be described as cement masons and as construction labourers. Thus, two different provincial agreements were applicable, resulting in overlapping jurisdiction. Since the jurisdictional clauses of the two agreements are to some extent contradictory, they cannot on their own be taken as dispositive of the issue. Rather, the Board pointed to other factors which can be taken into account, such as the nature of the work itself, and the assignment by the employers. In the instant case, it was clear that the waterproofers in issue were employed by their employer as construction labourers and not cement masons. The nature of the work they were performing confirmed this conclusion. The Board concluded that the waterproofers ought not participate in the representation vote. *Duron Ottawa*, [1983] OLRB Rep. Oct. 1639.

Casual employees not excluded from construction industry unit

In this construction industry application for certification, the respondent employer requested that employees who it regularly employs, but on a "casual basis", be excluded from the applicant union's proposed bargaining unit. The Board held that these "casual employees" would not be excluded from the unit. Due to the particular nature of the construction industry, the Board has had a long standing practice in certification applications not to distinguish between persons employed on a part-time or temporary basis from those employed on a more regular basis. Nothing on the facts of the case leads the Board to depart from this practice. *Freure Homes Limited*, [1983] OLRB Rep. Nov. 1839.

Sector determination in Construction Industry

The Board heard two applications under section 150 of the *Labour Relations Act*, wherein the Board was asked to determine whether two separate projects came within the industrial, commercial and institutional sector of the construction industry. The first project involved the construction of a nineteen level building built for, and on land owned by, the Hospital for Sick Children. The eighth to nineteenth levels of the building consist of 119 self-contained apartment units. The apartments are leased to the general public through a rental agent, although preference is given to doctors serving periods of residency at the Hospital. The first and second levels of the building are parking garages to be used by the occupants of the apartments. The third to seventh levels are also parking garages, but were to be used by the general public. The second project involved the construction of a building on the campus of the Salvation Army Training Centre in Toronto. The building has two floors and a basement. One of the floors has five self-contained apartments to be used by those attending the training centre. There was, among other things a large play area. The first floor contained a small lounge and offices. The section 150 determination centres around whether the concrete forming work on the two projects fell under the ICI provisions of the Act. The Board reviewed the history of concrete forming in the Toronto area, including the emergence of the Ontario Form Work Council and its bargaining arrangements. The Board also reviewed the collective bargaining history of the Metropolitan Toronto Apartment Builders Association, and in particular its agreement with the Toronto-Central Ontario Building and Construction Trades Council. Both respondents were bound to the terms of the agreement, and the applicant was a member of the Council. The agreement specifically states that it applies only to residential construction, and then defines what constitutes a residential project. The Board found that the general practice in the Toronto area has been to apply this definition when determining whether or not a project is residential. Both of the projects in question fell within the definition of a residential project.

The Board was of the view that local area practices and local agreements were relevant criteria in the Board making a ruling in a section 150 case. The Board warned, however, that such criterion would not always be relevant as there may be some projects which clearly fall into one sector or another and an agreement to the contrary would not influence the Board's determination. With respect to the Sick Children's Hospital, the Board found that more than half of the building could be classified by its use as residential and that the local agreements and practices would support a conclusion that it was residential. As such the Board concluded that the project did not fall within the ICI provisions of the Act. With respect to the Salvation Army complex, the Board found that the recreation part of the project was incidental to the general residential nature of the complex. In accordance with local agreements and practices the Board concluded that this project was also residential for the purposes of determining collective bargaining rights.

The Board also held that although the applicant in this case was a member of the Building Trades Council, it was not estopped in a section 150 application from taking a position which ran counter to the definition of a residential project contained in the agreement between the Council and the Apartment Builders Association. In this regard, the *Labour Relations Act* contains within its ICI provisions safeguards which ensure that parties cannot simply contract out of the provisions of the Act relating to the ICI sector. *West York Construction Ltd.*, |1983| OLRB Rep. Dec. 2132.

Construction industry bargaining unit certified although employer only peripherally in industry.

The applicant trade union applied for certification in respect of the employer's construction industry employees involved in pipefitting and steamfitting. The applicant already had bargaining rights with respect to the employer's maintenance operations. It was now seeking bargaining rights with respect to the employer's alleged activities in the construction industry.

The evidence established that the employer was engaged in a continuing basis in performing routine maintenance in connection with its buildings and structures. Toward the end of 1982, the respondent was engaged in a programme to install replacements for obsolete and/or non-functioning radiators and thermostats, so that its heating system would perform more economically. On the date of application, at least two of the seven plumbers employed by the respondent were engaged in this work.

The respondent employer argued that it was neither an "employer" nor a member of any "employer bargaining agency" as defined in section 117 of the *Labour Relations Act*. The employer also argued that it was neither a member of any "sector" as defined in section 117(e) of the Act, nor a member of any "employer bargaining agency" as defined in section 137(1)(d). The employer also asserted that as it did not carry on business in the construction industry, nor employ plumbers, pipefitters, steamfitters, or their apprentices in the construction industry, the construction industry provisions of the Act were not available to the applicant union.

The Board first determined whether the work in question could be properly characterized as construction rather than maintenance work and concluded that the work could be best characterized as "repairing", which by section 1(1)(f) of the Act is considered part of the construction industry.

The Board then considered the employer's objections. The Board admitted that the employer was principally involved in the business of providing education, and not construction. But an employer need not be principally concerned with construction to fall under the construction industry provisions of the Act. In the past, the Board has held that both Boards of Education and municipalities may on occasions operate businesses in the construction industry. The essential fact, the Board stated, is that the work performed on the date of the application for certification was clearly work which would fall within the industrial, commercial and institutional ("I.C.I.") sector of the construction industry. The fact that the employer had not previously been a member of an employer bargaining agency, and may not have previously performed work in any sector of the construction industry, did not insulate it from the consequences of its activities in the construction industry on the date of the application for certification. The union was therefore certified. *Board of Education for the City of Windsor,* |1983| OLRB Rep. May 831.

Enforceability of oral settlement of grievances

In this case the Board dealt with a section 124 referral alleging that the employer had not complied with an oral settlement of a prior grievance. In the earlier grievance, the applicant alleged that the grievor had been improperly laid off and unjustly discharged. A settlement of this grievance had allegedly been reached by the parties after a Labour Relations Officer had been appointed, but in the absence of that officer. The employer's position was that an oral settlement in these circumstances was not enforceable; that the non-compliance allegation was not arbitrable under section 124; and that the manager who had entered into the alleged settlement had no authority to do so.

The Board ruled that the allegation that the respondent had failed to comply with the settlement of a grievance constituted an arbitrable question concerning the "application" or "administration" of the collective agreement, within the meaning of subsection 124(1) of the Act. (It also ruled that a failure by the respondent to comply with the monetary portion of a settlement of the type alleged by the applicant would constitute a breach of a particular provision of the applicable collective agreement). In reviewing previous Board authority on the subject of oral settlements, the Board reiterated that nothing in the *Labour Relations Act,* the common law, or the pertinent arbitral jurisprudence requires that a settlement of a grievance be reduced to writing before the settlement can be enforced; nor in this case was there any such requirement contained in the collective agreement by which the parties in question were bound. The Board emphasized its commitment to settlement activity as a highly desirable method of resolving labour relations disputes, including grievances referred to the Board under section 124. The Board also indicated that it was loath to adopt any approach which might limit or impair the settlement process or discourage its use, by imposing unnecessary technicalities or limitations, such as an absolute requirement of written settlements in the context of section 124.

With respect to the matter of the manager's authority, the Board noted that there was nothing in the facts that would indicate to the union representative that the manager did not have authority to enter into the settlement in question. The Board further noted that reasonableness of the union representative's reliance upon his conclusion that the respondent's manager had such authority was supported both by the context in which this settlement was reached and by the history of the dealings between the individuals concerning grievance settlements. *Perfection Rug Co. Ltd.*, |1984| OLRB Rep. Jan. 68.

Status of Building Trades Council working agreement

In this referral under section 124 of the *Labour Relations Act* the applicants alleged that the respondents, by signing a working agreement with the Toronto-General Ontario Building and

Construction Trades Council, had voluntarily recognized the applicant trade unions and any other trade unions which are affiliated to the Council. As such, they alleged that the respondent violated the said agreements by employing persons who were not members of the applicant trade unions and engaged the use of sub-contractors who were not in collective bargaining relationships. Before the Board could examine the merits of this allegation it was required to determine the status of the Building Trades Council's Working Agreement.

In undertaking this determination, the Board reviewed the substantive provisions of the working agreement. It then applied the relevant definitions in the *Labour Relations Act* and concluded that the Council was neither "a trade union", nor "a certified council of trade unions" and that therefore the Council could not enter into a collective or voluntary recognition agreement in its own name. The Board noted however, that while the Council may not enter into a recognition agreement on its own behalf, it may do so as an agent of the affiliates of the Council. The effect of the employer signing the working agreement was to enter into a series of recognition agreements between its affiliates and itself.

Having ruled on the question of the status of the working agreement, the issue of whether bargaining rights could be acquired before the employees in question were actually employed by and working for an employer was addressed. In so doing, the Board referred to the principles enunciated in *Nicholls-Radtke*, [1982] OLRB Rep. July 1028. There the Board examined the unique circumstances of the construction industry. The Board noted that unemployed members in the union's hiring hall had already selected their bargaining agent as their union. This fact if read together with section 125 pointed to the conclusion that even when there are no employees in the bargaining unit, a bargaining agent may enter into a valid collective agreement.

Applying this reasoning, the Board found that the working agreement was signed on the understanding that the affiliates would supply competent workers upon request and that in the circumstances of the signing of the working agreement, a valid recognition agreement was signed by the Council as agent for its affiliates. Therefore, since the working agreement incorporates the collective agreements of the affiliates by reference, these agreements become applicable to the work performed by the employees of the respondent. *M.J. Guthrie Construction Ltd.*, [1984] OLRB Rep. Jan. 50.

Bench warrant refused where no due service of summons

In a construction industry grievance hearing, the union established that a witness, who had been served summons and conduct money, was not present at the hearing and sought a bench-warrant for the arrest and production of the witness. The evidence disclosed that the witness had been served the afternoon before the hearing date, even though the union was aware of the hearing date approximately ten days in advance.

The Board took notice that the same witness had failed to appear at an earlier proceeding and that the Board had issued a bench warrant in that instant. The Board also had evidence that the witness, as the principal of the respondent employer, may have had notice of the hearing well before the service of summons. Yet, the Board stated that receipt of notice of hearing as respondent is very different from notice of a requirement to attend as a witness pursuant to a summons. A respondent is under no obligation to attend a hearing whereas a witness is. Due to the short notice received by the witness, the Board was not prepared to find that there was due service of summons. The request for a bench warrant was denied and the hearing listed for continuation on another date. *Standard Insulation Ltd.*, [1984] OLRB Rep. Feb. 383.

VI COURT ACTIVITY

C.N. Shoes Company Limited,
Supreme Court of Ontario, Divisional Court,
April 19, 1983; Unreported

The union's complaint filed under section 89 of the Act alleging violations of sections 66 and 70 by unlawfully terminating two employees was upheld by the Board. The employer sought judicial review, the only basis relied on before the Court being that the Board had made wrong inferences from the evidence and from the facts found by the Board. The Court dismissed the application, finding no jurisdictional error.

Alcan Building Products, a Division of Alcan Canada Products Limited,
Supreme Court of Ontario, Toronto Motions Court,
May 12, 1983; Unreported

The union filed unfair practice complaints with the Board, requesting various remedies including damages. Prior to the hearing before the Board, the employer brought an application for prohibition under section 6(2) of the *Judicial Review Procedure Act* to prevent the Board from dealing with that aspect of the union's complaint relating to the claim for damages, on the basis that the Board lacked jurisdiction to grant the remedy sought.

The Court held that it was within the Board's jurisdiction to consider whether it was capable of granting the relief sought, and that should the Board in fact decide the case in a way that gave rise to jurisdictional error, the applicant would have a remedy by way of judicial review before the Divisional Court. The application for prohibition was dismissed.

Harold R. Stark Company Limited,
Supreme Court of Ontario, Divisional Court,
June 8, 1983; Unreported.

The union referred a grievance to the Board under section 124 of the Act, alleging the employer breached the collective agreement by subcontracting work to a subcontractor that was not a signatory to the Provincial Agreement with the union. The employer filed a jurisdictional dispute complaint under section 91 with the Board with respect to this matter. A majority of the Board held that the complaint did not fall within the provisions of section 91 of the Act.

The employer sought judicial review of the Board's decision. The Court held that whether the Board declines jurisdiction under the Act or having assumed jurisdiction subsequently makes an error in interpretation of the Act, the test is whether the interpretation was patently unreasonable or a genuine error of law of such magnitude as to justify the intervention of the court. Finding neither, the application was dismissed.

Biltmore Stetson (Canada) Inc., et al.,
Supreme Court of Ontario, Court of Appeal, June 16, 1983;
43 O.R. (2d) 243; 150 D.L.R. (3d) 577; 83 C.L.L.C. 14,062; 21 A.C.W.S. (2d) 455.

The union appealed the decision of the Supreme Court of Ontario, Toronto Motions Court in this matter which had granted an application for judicial review (see Ontario Labour Relations

Board Annual Report 1982-83) to the Ontario Court of Appeal. The issue was whether the Board had properly viewed a notice to bargain served by a union upon an employer, as notice within the meaning of section 63 of the Act.

The Court of Appeal in allowing the appeal held that the Board had not asked itself the wrong question in any sense of departing from their proper inquiry. Further, the wrong question test is of little relevance in resolving whether any error is jurisdictional. The Court also held that section 63(3) could be interpreted in the way the Board had done, and that the Board's interpretation of its authority was not patently unreasonable.

The Court also rejected the arguments with respect to the misnomer of the employer and summarily dismissed the challenge to the Board's decision based on the freedom of association provision in the *Canadian Charter of Rights and Freedoms.*

George Ryder Construction Ltd.,
Supreme Court of Ontario, Divisional Court,
June 20, 1983; Unreported

The Board, in deciding a grievance submitted to it under section 124 of the Act, held that the union need not prove its damages by producing witnesses to be available for cross-examination with respect to mitigation of damages. The Board found that the union, having established the existence of three members on its out of work list at the time of breach, had proved its damages.

The employer sought judicial review on the basis that the Board had no evidence on which to base its finding. The Court held, in dismissing the application, that there was evidence before the Board which could form the basis for the compensation awarded to the union and that the Board's decision not to require further evidence was within its jurisdiction and was not a denial of natural justice.

Gurnham Dhanota,
Supreme Court of Ontario, Divisional Court, June 29, 1983;
42 O.R. (2d) 74; 148 D.L.R. (3d) 569; 83 C.L.L.C. 14,052;
Court of Appeal
September 7, 1983; Unreported

The applicant filed a complaint with the Board alleging a breach of the duty of fair representation in section 68 of the Act by the respondent trade union. The Board conducted a hearing on the preliminary objection by the union contending that the Board should not hear the merits of the complaint due to the lengthy delay in filing. The Board upheld the objection and dismissed the complaint without a hearing on the merits.

The applicant sought judicial review, firstly on the basis that section 89(4) should be interpreted so as to give the Board no discretion to decline to inquire into a complaint, and secondly on the basis that the Board had no right to fetter its own discretion by holding a show-cause hearing with respect to the delay before investigating the merits of the application.

The Court held that section 89(4) did give the Board a discretion, and that the Board in exercising that discretion is entitled to lay down its own procedure. The application was dismissed.

Subsequently, an application for leave to appeal was denied by the Court of Appeal.

Bhupinder Singh Sidhu,
Supreme Court of Ontario, Divisional Court,
June 30, 1983; Unreported

The applicant filed a section 89 complaint with the Board alleging a violation of section 68 of the Act by the trade union respondent. The Board found no violation.

The applicant sought judicial review on the basis that the Board had exceeded its jurisdiction by failing to answer the question remitted to it, by making findings of fact on no evidence, and by committing an error of law, and further that the Board had wrongfully declined jurisdiction by ignoring the question remitted to it.

The Court in dismissing the application held that the Board had fairly considered the evidence and the representations made to it, making no error of law, committing no breach of natural justice, and not declining jurisdiction.

Foodcorp Limited (Urbana Restaurant Division Commerce Court),
Supreme Court of Ontario, Toronto Motions Court,
July 11, 1983; Unreported.

The union had recently had several locals of the same international amalgamated with it. It had also undergone a minor change of name. Subsequently the union filed an application for certification in its former name. Following a pre-hearing vote, the Board certified the union, despite discrepancies in the name of the union in some of the membership evidence. The Board held that the change of name did not amount to a change of entity and that there was no possibility of confusion in the minds of the employees as to which entity they were joining.

The employer sought judicial review and pending this, sought a stay of the Board's decision. The stay application was dismissed. The application for judicial review is pending.

Knob Hill Farms Limited,
Supreme Court of Ontario, Toronto Motions Court,
July 29, 1983; Unreported

The Board, in hearing a section 89 complaint filed against the employer, required the employer to proceed first because of the reverse onus provided for in section 89(5). The employer filed an application for judicial review of the Board procedural ruling and sought a stay of the Board's proceedings pending the hearing of its application for judicial review.

The Court denied the stay application, finding the balance of convenience in favour of allowing the hearing to proceed. The application for judicial review is pending.

Bioshell Inc.,
Supreme Court of Ontario, Toronto Motions Court,
September 6, 1983; Unreported

Two unions sought certification from the Board with respect to the same unit, one as applicant, one as intervener. The Board ordered a vote but did not include a "no union" option on the ballot, both unions having filed membership evidence indicating in excess of fifty-five per cent support.

The employer filed an application for judicial review and sought a stay of the Board's proceedings pending the hearing of the application.

The application for a stay of proceedings was dismissed. The application for judicial review is pending.

International Wallcoverings, A Division of International Paints (Canada) Limited
Supreme Court of Ontario, Toronto Motions Court,
September 12, 1983; Unreported

The union filed a section 89 complaint with the Board with respect to the employer's dismissal of certain striking employees for alleged strike-related misconduct. The Board found violations of sections 64, 66 and 70 of the Act.

The employer filed an application for judicial review and sought a stay of the Board's decision pending the hearing of their application for judicial review, primarily arguing that the Board had misinterpreted section 64.

The stay application was dismissed. The judicial review application is pending.

Broadway Manor Nursing Home, et al.,
Supreme Court of Ontario, Divisional Court, October 24, 1983;
44 O.R. (2d) 392; 4 D.L.R. (4th) 231; 22 A.C.W.S. (2d) 231;
Court of Appeal,
November 14, 1983; Unreported

The applicant union filed a displacement application with the Board. The Board dismissed the application, holding it to be untimely, on the basis that by virtue of section 13(b) of the *Inflation Restraint Act*, the "open period" had been closed.

The union sought judicial review on the basis that the Board had misinterpreted section 13(b) or alternatively on the basis that the *Inflation Restraint Act* was inconsistent with the freedom of association guaranteed by section 2(d) of the *Canadian Charter of Rights and Freedoms*.

The Court, which heard the application together with two other applications relating to the *Inflation Restraint Act*, allowed the application for judicial review, quashing the decision of the Board and remitting the matter to be dealt with accordingly. One justice based his decision on a finding that the Board's interpretation of section 13(b) was incorrect. The *Inflation Restraint Act* not being the home statute of the Board he held this was a reviewable error. He found in the alternative that the *Act* violated the *Charter*. The other two justices found that though the Board correctly interpreted section 13(b), the *Act* violated the *Charter* and was therefore, to the extent it violated it, of no force and effect.

The respondents were subsequently granted leave to appeal by the Court of Appeal. That application is pending before the Court of Appeal.

Gerald O. Aspinall; Walter Deringer; Douglas N. Butler; Helen Sarah Freedhoff, John M. Goodings; William A. Jordan; Alfred B.P. Lever; Robert P. McEachran; Delmor McCormack Smyth,
Supreme Court of Ontario, Divisional Court,
November 30, 1983; 44 O.R. (2d) 251; 3 D.L.R. (4th) 763; 84 CLLC ¶ 14,010

Nine separate applications had been made to the Board under section 47 of the Act, for religious exemption from the payment of dues. All of the applications were denied by the Board because the applicants' convictions were held not to be religious as they did not in some way relate to the Divine.

The applicants each sought judicial review on the basis that the Board had wrongly interpreted section 47. The Court in separately dismissing the applications, found no error in the Board's interpretation. In addition the Court rejected the applicant's argument that sections 43 and 46 violate the *Canadian Charter of Rights and Freedoms*, on the grounds of inadequacy of notice to the parties and absence of notice to the Attorneys-General as required by sections 35 of the *Judicature Act*.

Traugott Construction Limited**,**
Supreme Court of Ontario, Divisional Court,
January 20, 1984; 45 O.R. (2d) 129; 6 D.L.R.(4th) 122, 84 CLLC ¶ 14,025; 4 Admin. L.R. 98

The union referred a grievance to the Board under section 124 of the Act. The Board found that the collective agreement had been signed as a result of unlawful picketting by the council of trade unions to which the union belonged. The Board therefore refused to give effect to the agreement and held that the grievance was therefore not arbitrable.

The union sought judicial review. The Court adopting as its test, whether the Board's interpretation was so patently unreasonable as to permit interference by the Court, dismissed the application. The Court held in the alternative that this was not a proper case to exercise its discretion to grant judicial review, as the union's cause of action was founded upon its own illegal act.

Consolidated Bathurst Packaging Ltd.**,**
Supreme Court of Ontario, Divisional Court,
February 13, 1984; 24 A.C.W.S. (2d) 49.

In a decision dated September 30, 1983 the Board found that the respondent employer had contravened the duty to bargain in good faith by failing to disclose a planned plant closure during negotiations. The employer filed an application for reconsideration, claiming *inter alia* that there was a denial of natural justice in that the panel that heard the case had discussed the matter with other members and staff of the Board. This application for reconsideration was dismissed by the Board by decision dated December 9, 1983. The employer filed an application for judicial review of the Board decision on the grounds of denial of natural justice.

In the interim, the parties having failed to agree upon the quantum of damages flowing from the breach, the Board scheduled a further hearing to deal with the question of remedy. The employer filed a motion under section 4 of the *Judicial Review Procedure Act*, seeking a stay of the proceedings. Having received the submissions of the counsel for the employer, the court was of the opinion that the balance of convenience did not justify a stay of proceedings and the application was dismissed.

***Consolidated Bathurst Packaging Ltd.*,**
Supreme Court of Ontario, Divisional Court,
March 6, 1984; Unreported.

Subsequent to the dismissal of its application for a stay of proceedings, the employer moved for an order directing the Board to produce a copy of "a draft decision", (which had been referred to in the Board's decision dismissing the employer's application for reconsideration) and to add such draft decision to the record of the Board that had been filed in court in relation to the employer's application for judicial review.

In dismissing the application, the court noted that there was no dispute as to what was the process the Board had followed. The issue before the court in the application for judicial review was whether this undisputed Board procedure resulted in a denial of natural justice. The court was of the opinion that the draft decision was not necessary for the court to determine the issue before it. However, the court noted that if the full court hearing the application for judicial review determines that the draft decision is necessary for the determination of the issue before it, the court is empowered to direct that the draft decision be forwarded for inclusion in the record.

***Quaker Oats Company of Canada Limited; Black Diamond Cheese*,**
Supreme Court of Ontario, High Court,
March 21, 1984; Unreported.

The Quaker Oats Employees Independent Union and the Black Diamond Cheese Employees Independent Union applied for certification with respect to the employees of the employers to displace the incumbent United Food and Commercial Workers. The Board satisfied itself of the degree of the applicants' membership support and directed pre-hearing representation votes. The UFCW filed two applications for judicial review on the basis, *inter alia*, that by directing pre-hearing votes prior to determining whether the applicants were trade unions under the Act, the Board had exceeded its jurisdiction.

The applications were returnable before a single judge of the High Court and the UFCW argued that the delay resulting in having the matter heard before the Divisional Court would result in a failure of justice. After considering the submissions of the parties the court was not persuaded that irreparable harm or failure of justice was a likely result of transferring the matter for hearing before the Divisional Court. The applications for a speedy hearing were therefore dismissed and the matters are presently pending before the Divisional Court.

VII CASELOAD

In fiscal year 1983-84, the Board received a total of 3,135 applications and complaints, an increase of 14 percent over the intake of 2,762 cases in 1982-83. Applications for certification of trade unions as bargaining agents, one of the three major categories of the Board caseload, increased by 15 percent from last year's filings. The second major category — complaints of contravention of the Act — increased by 9 percent, while the third major category — referrals of grievances under construction industry collective agreements — decreased by seven cases.

In addition to the cases received, 409 were carried over from the previous year, making a total caseload of 3,544 in 1983-84. Of the total, 2,797, or 79 percent, were disposed of during the year; proceedings in 213 were adjourned sine die* (without a fixed date of further action) at the request of the parties, and 534 were pending in various stages of processing at March 31, 1984.

The total number of cases processed during the year produced an average workload of 322 cases for the Board's full-chairman and vice-chairmen, and the total disposition represented an average output of 254 cases.

Labour Relations Officer Activity

In 1983-84, the Board's labour relations officers were assigned a total of 2,029 cases to help the parties settle differences between them without the necessity of formal litigation before the Board. The assignments comprised 57 percent of the Board's total caseload, and included 459 certification applications, 37 cases concerning the status of individuals as employees under the Act, 743 complaints of alleged contraventions of the Act, 763 grievances under construction industry collective agreements, and 30 complaints under the *Occupational Health and Safety Act*. (Table 3).

The labour relations officers completed activity in 1,657 of the assignments, obtaining settlements in 1,402 or 85 percent. They referred 255 cases to the Board for decisions, proceedings were adjourned sine die in 100 cases, and settlement efforts were continuing in the remaining 276 cases at March 31, 1984.

Labour relations officers were also successful in having hearings waived by the parties in 138, or 62 percent, of 222 certification applications assigned for this purpose.

Representation Votes

In 1983-84, the Board's returning officers conducted and counted the results of 182 representation votes held among employees in one or more bargaining units in cases that were either disposed of during the year or in which a final decision closing the case had not been issued by the Board by March 31, 1984. Of the total votes, 138 involved certification applications, and 44 were held in applications for termination of existing bargaining rights. (Table 5).

One hundred and three of the certification votes involved a single union on the ballot, 34 involved two unions, and one involved 3 unions. Of the multi-union votes, 31 entailed attempts to replace incumbent bargaining agents, and four involved two unions seeking to represent the same employees in collective bargaining for the first time.

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* The Board regards sine die cases as disposed of, although they are kept on docket for one year.

A total of 10,137 employees were eligible to vote in the 182 elections held, of whom 8,418, or 83 percent, cast ballots. Of those who participated, 4,245 voted in favour of union representation. Sixty-six percent of the employees who participated in the two-union certification elections voted for union representation, compared to 48 percent who voted for union representation in the single-union elections.

Last Offer Votes

In addition to taking votes ordered in its cases, the Board's Registrar was requested by the Minister to conduct votes among employees on employers' last offer for a settlement of a collective agreement dispute under section 40(1) of the Act. Although the Board is not responsible for the administration of votes under that section, the Board's Registrar and field staff, because of their expertise and experience in conducting representation votes under the Act, are used to make the necessary arrangements for the orderly administration of votes directed by the Minister under that section.

Of the 21 requests received by the Minister during the fiscal year, votes were conducted in 15 situations, and settlements were reached in the other six cases before a vote was taken.

Of the 15 votes held, employees accepted the employer's offer in 3 cases by 67 votes in favour and 40 against, and rejected the offer in 12 cases by 533 votes in favour and 1,485 against.

Since the section was introduced in June 1980, a total of 87 requests were made to the Minister up to March 31, 1984. The employer's offer was accepted in 10 cases and turned down in 47 cases. Settlements were reached in 26 cases and the request was withdrawn in 4 cases prior to a vote being conducted.

Hearings

The Board held a total of 1,693 hearings and continuation of hearings in 1,315, or 37 percent of the 3,544 cases processed during the fiscal year, an increase of 237 sittings over the number held in 1982-83. One hundred and thirteen of the hearings were conducted by vice-chairmen sitting alone, compared with 40 in 1982-83.

Processing Time

Table 7 provides statistics on the time taken by the Board to process the 2,797 cases disposed of in 1983-84. Information is shown separately for the three major categories of cases handled by the Board: certification applications, complaints of contraventions of the Act, and referrals of grievances under construction industry collective agreements.

A median of 29 days were taken to proceed from filing to disposition for the 2,797 cases completed in 1983-84, compared to 27 days in 1982-83. Certification applications were processed in a median of 22 days, a drop of 3 days from 1982-83; complaints of contravention of the Act took 29 days, the same as in 1982-83; referrals of construction industry grievances required 15 days, compared to 17 days in 1982-83; and the median time for the total of all other cases dropped to 43 days from 60 days in 1982-83.

More than 82 percent of all dispositions were accomplished in 84 days (3 months) or less, compared to 87 percent for certification applications, 78 percent for complaints of contraventions of the Act, 89 percent for referrals of construction industry grievances, and 72 percent for the total of all other types of cases. The number of cases requiring more than 168 days (6 months) to complete dropped to 195 from 199 in 1982-83.

Certification of Bargaining Agents

In 1983-84, the Board received 871 applications for certification of trade unions as bargaining agents of employees, an increase of 113 or 15 percent from 1982-83. (Tables 1 and 2).

The applications were filed by 87 trade unions, including 28 employee associations. Eleven of the unions, each with more than 20 applications, accounted for 65 percent of the total filings: Labourers (94 cases), Carpenters (84 cases), Public Employees (CUPE) (63 cases), Food and Commercial Workers (58 cases), Service Employees International (57 cases), International Operating Engineers (49 cases), Teamsters (37 cases), United Steelworkers (35 cases), Retail Wholesale Employees (34 cases), Auto Workers (30 cases), and Hotel Employees (23 cases). In contrast, 66 percent of the unions filed fewer than 5 applications, with the majority making just one application. These unions together accounted for 11 percent of the total certification filings. (Table 8).

Table 9 gives the industrial distribution of the certification applications received and disposed of during the year. Non-manufacturing industries accounted for 76 percent of the applications received, concentrated in construction (254 cases), health and welfare services (109 cases), accommodation and food services (53 cases), miscellaneous services (38 cases), and retail trade (35 cases). These five groups comprised 74 percent of the total non-manufacturing applications. Of the 209 applications involving establishments in manufacturing industries, 61 percent were in six groups: food and beverage (36 cases), metal fabricating (31 cases), transportation equipment (17 cases), printing, publishing (15 cases), wood products (14 cases), and chemical and chemical products (14 cases).

In addition to the applications received, 108 cases were carried over from last year, making a total certification caseload of 979 in 1983-84. Of the total, 817 were disposed of, proceedings were adjourned in 11 cases, and 151 cases were pending at March 31, 1984. Of the 817 dispositions, certification was granted in 555 cases including 48 in which interim certificates were issued under section 6(2) of the Act, and 3 that were certified under section 8; 117 cases were dismissed; proceedings were terminated in 3 cases; and 142 cases were withdrawn. The certified cases represented 68 percent of the total dispositions, compared to 67 percent in 1982-83.

Of the 672 applications that were either certified or dismissed, final decisions in 140 cases were based on the results of representation votes. Of the 142 votes conducted, 105 involved a single union on the ballot; and 36 were held between two unions, of which 34 affected incumbent bargaining agents and two involved two applicants. Applicants won in 73 of the votes and lost in the other 69.

A total of 9,228 employees were eligible to vote in the 142 votes, of whom 7,508 or 81 percent cast ballots. In the 73 votes that were won and resulted in certification, 3,905 or 79 percent of the 4,937 employees eligible to vote cast ballots, and of these voters 2,605 or 67 percent favoured union representation. In the 69 elections that were lost and resulted in dismissals, 3,603 or 84 percent of the 4,291 eligible employees participated, and of these only 34 percent voted for union representation. (Table 6).

Small bargaining units continued to be the predominant pattern of union organizing efforts through the certification process in 1983-84. The average size of the 555 applications that were certified was 31 employees, compared to 27 in 1982-83. Units in construction certifications averaged 6 employees, the same as in 1982-83; and in non-construction certifications they averaged 40 employees, compared to 36 in 1982-83. Seventy-seven percent of the total certifications, including all except three in construction, involved units of fewer than 40 employees, and about 41 percent applied to units of fewer than 10 employees. The total number of employees covered by the 555 certified cases increased to 17,043 from 14,272 in 1982-83.

Improvements were made for the second consecutive year in the time taken by the Board to process applications in which certification was granted. A median time of 22 calendar days was required to complete the 555 certified cases from receipt to disposition, compared to 23 days in 1982-83. For non-construction certifications the median time was 22 days, compared to 24 days in 1982-83, and for construction certifications the median time was 15 days, compared to 17 days in 1982-83.

Ninety-one percent of the 555 certified cases were disposed of in 84 days (3 months) or less, 83 percent took 56 days (2 months) or less, 60 percent required 28 days (one month) or less, and 47 percent were processed in 21 days (3 weeks) or less. Twenty-three cases required longer than 168 days (6 months) to process, compared to 14 cases in 1982-83.

Termination of Bargaining Rights

In 1983-84, the Board received 124 applications under sections 57, 59, 60, 61 and 123 of the Act, seeking termination of the bargaining rights of trade unions, 9 more than in 1982-83. In addition, 25 cases were carried over from 1982-83.

Of the total cases processed bargaining rights were terminated in 68 cases, 39 cases were dismissed, 10 were withdrawn, proceedings were terminated or adjourned sine die in 4 cases, and 28 cases were pending at March 31, 1984.

Unions lost the right to represent 1,357 employees in the 68 cases in which termination was granted, but retained bargaining rights for 1,114 employees in the 49 cases that were either dismissed or withdrawn.

Of the 107 cases that were either granted or dismissed, dispositions in 45 were based on the results of representation votes. A total of 1,013 employees were eligible to vote in the 47 elections that were held, of whom 909 or 90 percent cast ballots. Of those who cast ballots, 203 voted for continued representation by unions and 690 voted against.

Declaration of Successor Trade Union

In 1983-84, the Board dealt with 22 applications for declarations under section 62 of the Act, on the bargaining rights of successor trade unions resulting from a union merger or transfer of jurisdiction.

Affirmative declarations were issued by the Board in 18 cases, one case was dismissed, and three were pending at March 31, 1984.

Declaration of Successor or Common Employer

In 1983-84, the Board dealt with 200 applications for declarations under section 63 of the Act, on the bargaining rights of trade unions at successor employers resulting from a business role, or for declarations under section 1(4) to treat two companies as one employer. The two types of request are often made in a single application.

Affirmative declarations were issued by the Board in 13 cases, 75 cases were either settled or withdrawn by the parties, 24 cases were dismissed, proceedings were terminated and adjourned sine die in 36 cases, and 52 cases were pending at March 31, 1984.

Accreditation of Employer Organizations

One application was processed under sections 125 through 127 of the Act for accreditation of employer organizations as bargaining agents of employers in the construction industry. The case was pending at March 31, 1984.

Declaration and Direction of Unlawful Strike

In 1983-84, the Board received one case seeking a declaration under section 92 against an alleged unlawful strike by employees in the construction industry. The case wass pending at March 31, 1984.

Thirty applications were dealt with seeking directions under section 92 against alleged unlawful strikes by employees in non-construction industries. Directions were issued in 7 cases, 5 cases were dismissed, 8 were withdrawn or settled, proceedings were terminated or adjourned sine die in 8 cases, and 2 cases were pending at March 31, 1984.

Twenty-seven applications were also processed, seeking directions under section 135 of the Act against alleged unlawful strikes by construction workers. Directions were issued in 2 cases, 18 were withdrawn or settled, and proceedings were terminated or adjourned sine die in 7 cases.

Declaration and Direction of Unlawful Lock-out

Seven applications were processed, in 1983-84, seeking declaration under section 93 of the Act against alleged unlawful lock-out by construction employers. One case was dismissed, one was withdrawn, proceedings were terminated in one case, and 4 cases were pending at March 31, 1984.

Nine applications were also processed in seeking directions under section 93 of the Act against alleged unlawful lock-outs by non-construction employers. A declaration was issued in one case, 3 cases were withdrawn or settled, and five were pending at March 31, 1984.

Complaints of Contravention of Act

Complaints alleging contraventions of the Act may be filed with the Board for processing under section 89 of the Act. In handling these cases the Board emphasizes voluntary settlements by the parties involved, with the assistance of a labour relations officer.

In 1983-84, the Board received 872 section 89 complaints, an increase of 20 percent over the 724 filed in 1982-83. In complaints against employers, the principal charges were alleged illegal discharge or discrimination of employees for union activity in violation of sections 64 and 66 of the Act, illegal changes in wages and working conditions contrary to section 79, and failure to bargain in good faith under section 15. These charges were made mostly in connection with applications for certification. The principal charge against trade unions was alleged failure to represent employees fairly in grievances against their employer.

In addition to the complaints received, 113 cases were carried over from 1982-83. Of the 985 total processed, 787 were disposed of, proceedings were adjourned sine die in 45 cases, and 153 cases were pending at March 31, 1984.

In 592 or 75 percent of the 787 dispositions, voluntary settlements and withdrawal of the complaint were secured by labour relations officers (Table 4), remedial orders were issued by the Board in 58 cases, 117 cases were dismissed, and proceedings were terminated in the remaining 20 cases.

In the settlements secured by labour relations officers compensation amounting to about $314,700 was made to aggrieved employees, as well as offers of reinstatement in many cases. In the 58 cases in which violations of the Act were found by the Board, employers and unions were ordered to pay full compensation to 95 employees for wages and benefits lost in a specified period, fifty of the employees were also ordered reinstated. An additional five employees were reinstated but received no monetary award.

In addition, employers in 28 cases were ordered to post a Board notice of the employees' rights under the Act, and cease and desist directions were issued to employers in 14 other cases.

Construction Industry Grievances

Grievances over alleged violation of the provisions of a collective agreement in the construction industry may be referred to the Board for resolution under section 124 of the Act. As with complaints of contraventions of the Act, the Board emphasizes voluntary settlement of these cases by the parties involved, with the assistance of a labour relations officer.

In 1983-84, the Board received 824 cases under section 124, a decrease of one percent from the 831 filed in 1982-83. The principal issues in these grievances were alleged failure by employers to make required contributions to health and welfare, pension and vacation funds and deduction of union dues, and alleged violation of the sub-contracting and hiring arrangements in the collective agreement.

In addition to the cases received, 84 were carried over from 1982-83. Of the 908 total processed, 732 were disposed of, proceedings were adjourned sine die in 99 cases, and 77 cases were pending at March 31, 1984.

In 654 or 89 percent of the 732 dispositions, voluntary settlements and withdrawal of the grievance were obtained by labour relations officers (Table 4), awards were made by the Board in 45 cases, 20 cases were dismissed, and proceedings were terminated in the remaining 13 cases.

Payments totalling about $1,620,500 were recovered for unions and employees in the cases settled by labour relations officers and those in which Board awards were made.

MISCELLANEOUS APPLICATIONS AND COMPLAINTS

Right of Access

In 1983-84, the Board dealt with nine applications in which the union sought access to the employer's property under section 11 of the Act. Four cases were settled, one case was withdrawn, and 4 cases were pending at March 31, 1984.

Religious Exemption

Five applications were processed under section 47 of the Act, seeking exemption for employees from the union security provisions of collective agreements because of their religious beliefs. Exemption was granted in 2 cases and 3 cases were dismissed.

Early Termination of Collective Agreements

Thirty-one applications were processed under section 52(3) of the Act, seeking early termination of collective agreements. Consent was granted in 26 cases, one case was dismissed, and 4 were pending at March 31, 1984.

Union Financial Statements

Thirteen complaints were dealt with under section 85 of the Act, alleging failure by trade unions to furnish members with audited financial statements of the union's affairs. One case was dismissed, 4 were settled or withdrawn, proceedings were terminated in 4 cases, and 4 were pending at March 31, 1984.

Jurisdictional Disputes

Thirty-five complaints were dealt with under section 91 of the Act, involving union work jurisdiction. Assignment of the work in dispute was made by the Board in 3 cases, 4 cases were dismissed, 7 were settled or withdrawn, proceedings were terminated or adjourned sine die in 10 cases, and 11 cases were pending at March 31, 1984.

Determination of Employee Status

The Board dealt with 65 applications under section 106(2) of the Act, seeking decisions on the status of the individuals as employees under the Act. Twenty-nine cases were settled or withdrawn by the parties in discussions with labour relations officers (Table 4). Determinations were made by the Board in 8 cases, in which 34 of the 42 persons in dispute were found to be employees under the Act. Four cases were dismissed, proceedings were terminated or adjourned sine die in 7 cases, and 17 cases were pending at March 31, 1984.

Referrals by Minister of Labour

In 1983-84, the Board dealt with 10 cases referred by the Minister under section 107 of the Act for opinions on questions related to the Minister's authority to appoint a conciliation officer under section 16 of the Act, or an arbitrator under section 44 or 45. Determinations were made in 3 cases, in which the Board declared the Minister's authority to appoint a conciliation officer;

one case was withdrawn, proceedings were terminated in two cases; and 4 cases were pending at March 31, 1984.

One case was referred to the Board by the Minister under section 139(4) of the Act, concerning the designations of the employee and the employer agencies in a bargaining relationship in the industrial, commercial and institutional sector of the construction industry. The case was pending at March 31, 1984.

Trusteeship Reports

Three statements were filed with the Board during the year reporting that local unions had been placed under trusteeship.

Occupational Health and Safety Act

In 1983-84, the Board received 32 complaints under section 24 of the *Occupational Health and Safety Act*, alleging wrongful discipline or discharge of employees for acting in compliance with the Act. Six cases were carried over from 1982-83.

Of the total cases processed, 22 were settled or withdrawn by the parties in discussions with labour relations officers (Table 4), 3 were granted and 3 were dismissed by the Board, and the remaining 9 were pending at March 31, 1984.

Colleges Collective Bargaining Act

Four complaints were dealt with under section 78 of the *Colleges Collective Bargaining Act*, alleging contraventions of the Act. Three cases were withdrawn or settled, and one was pending at March 31, 1984.

Two applications were dealt with under section 82 for decisions on the status of individuals as employees under the Act. Both were pending at March 31, 1984.

Statistics on the cases under the *Colleges Collective Bargaining Act* dealt by the Board are included in Table 1.

VIII BOARD PUBLICATIONS

The Ontario Labour Relations Board publishes the following:

The *Ontario Labour Relations Board Monthly Report*, a monthly publication of selected Board decisions which also contains other information and statistics on proceedings before the Board.

A Guide to the Ontario Labour Relations Act, a booklet explaining in laymen's terms the provisions of the *Labour Relations Act* and the Board's practices. This publication is revised periodically to reflect current law and Board practices. The Guide is also available in French.

Monthly Highlights, a publication in leaflet form containing brief summaries of significant Board decisions on a monthly basis. This publication also contains Board notices of interest to the industrial relations community and information relating to new appointments, retirements and other internal developments.

Pamphlets, the two pamphlets published by the Board to date ("Rights of Employees, Employers, and Trade Unions" and "Certification by the Ontario Labour Relations Board") have been well received. These pamphlets have been translated into French, Italian and Portuguese. During the year under review the Board published a third pamphlet entitled, "Unfair Labour Practice Proceedings before the Ontario Labour Relations Board." This pamphlet describes unfair labour practice proceedings before the Board and contains instructions on filling out form 58.

Last year, the Board published a revised construction industry map depicting the geographic areas in the province used by the Board in certification applications relating to the construction industry.

All of the Board's publications may be obtained by calling; writing, or visiting the Board's offices.

IX STAFF AND BUDGET

At the end of the fiscal year 1983-84, the Board employed a total of 96 persons on a full time basis. The Board has two types of employees. The Chairman, Alternate-Chairman, Vice-Chairmen and Board Members are appointed by the Lieutenant Governor in Council. The administrative, field and support staff are civil service appointees.

The total budget of the Ontario Labour Relations Board for the fiscal year was $4,505,300.00.

X STATISTICAL TABLES

The following statistics are indicative of the activities of the Ontario Labour Relations Board during the fiscal year 1983-84.

Table 1: Total Applications and Complaints Received, Disposed of and Pending, Fiscal Year 1983-84

Table 2: Applications and Complaints Received and Disposed of, Fiscal Years 1978-79 to 1983-84

Table 3: Labour Relations Officer Activity in Cases Processed, Fiscal Year 1983-84

Table 4: Labour Relations Officer Settlements in Cases Disposed of, Fiscal Year 1983-84

Table 5: Results of Representation Votes Conducted, Fiscal Year 1983-84

Table 6: Results of Representation Votes in Cases Disposed of, Fiscal Year 1983-84

Table 7: Time Required to Process Applications and Complaints Disposed of, by Major Type of Case, Fiscal Year 1983-84

Table 8: Union Distribution of Certification Applications Received and Disposed of, Fiscal Year 1983-84

Table 9: Industry Distribution of Certification Applications Received and Disposed of, Fiscal Year 1983-84

Table 10: Size of Bargaining Units in Certification Applications Granted, Fiscal Year 1983-84

Table 11: Time Required to Process Certification Applications Granted, Fiscal Year 1983-84

Table 1

Total Applications and Complaints Received, Disposed of and Pending Fiscal Year 1983-84

Type of Case	Caseload			Disposed of Fiscal Year 1983-84							
	Total	Pending April 1, 83	Received Fiscal Year 1983-84	Total	Granted*	Dismissed	Terminated	Withdrawn	Settled	Sine Die	Pending March 31, '84
Total	3,544	409	3,135	2,797	812	343	64	530	1,048	213	534
Certification of bargaining agents	979	108	871	817	555	117	3	142	–	11	151
Declaration of Termination of Bargaining Rights	149	25	124	119	68	39	2	10	–	2	28
Declaration of Successor Trade Union	22	–	22	19	18	1	–	–	–	–	3
Declaration of Successor Employer or Common Employer Status	200	26	174	118	13	24	6	22	53	30	52
Accreditation	1	–	1	–	–	–	–	–	–	–	1
Declaration of Unlawful Strike	1	–	1	–	–	–	–	–	–	–	1
Declaration of Unlawful Lockout	7	1	6	3	–	1	1	1	–	–	4
Direction respecting Unlawful Strike	57	2	55	43	9	5	3	11	15	12	2
Direction respecting Unlawful Lockout	9	1	8	4	1	–	–	2	1	–	5
Consent to Prosecute	19	4	15	12	–	3	2	7	–	4	3
Contravention of Act	985	113	872	787	58	117	20	188	404	45	153
Right to Access	9	1	8	5	–	–	–	1	4	–	4
Exemption from Union Security Provision in Collective Agreement	5	1	4	5	2	3	–	–	–	–	–
Early Termination of Collective Agreement	31	5	26	27	26	1	–	–	–	–	4
Trade Union Financial Statement	13	7	6	9	–	1	4	2	2	–	4
Jurisdictional Dispute	35	15	20	20	3	4	6	7	–	4	11
Referral on Employee Status	65	9	56	43	8	4	2	15	14	5	17

Table 1 (Cont'd.)

Total Applications and Complaints Received, Disposed of and Pending Fiscal Year 1983-84

Referral from Minister on Appointment of Conciliation Officer or Arbitrator	10	1	9	6	3	–	2	1	–	–	4
Referral of Construction Industry Grievance	908	84	824	732	45	20	13	112	542	99	77
Referral from Minister on Construction Bargaining Agency	1	–	1	–	–	–	–	–	–	–	1
Complaint under *Occupational Health and Safety Act*	38	6	32	28	3	3	–	9	13	1	9

* Includes cases in which a request was granted or a determination made by the Board.

Table 2

Applications and Complaints Received and Disposed of Fiscal Years 1979-80 to 1983-84

Type of Case	Number Received, Fiscal Year						Number Disposed of, Fiscal Year					
	Total	1979-80	1980-81	1981-82	1982-83	1983-84	Total	1979-80	1980-81	1981-82	1982-83	1983-84
Total	13,964	2,482	2,836	2,749	2,762	3,135	12,809	2,248	2,711	2,608	2,445	2,797
Certification of bargaining agents	5,006	1,136	1,152	1,089	758	871	4,986	1,103	1,178	1,101	767	817
Declaration of termination of bargaining rights	511	70	104	98	115	124	500	72	111	78	120	119
Declaration of successor trade union or employer	224	50	55	50	47	22	214	55	54	35	51	19
Declaration of common employer status	318	30	37	36	41	174	236	28	29	30	31	118
Accreditation	8	3	2	1	1	1	11	3	5	–	3	–
Declaration of unlawful strike or lockout	35	15	6	4	3	7	26	11	7	3	2	3
Directions respecting unlawful strike or lockout	352	78	76	59	76	63	240	51	47	34	61	47
Consent to prosecute	120	48	22	17	18	15	112	50	23	10	17	12
Contravention of Act	3,548	607	705	640	724	872	3,309	522	704	622	674	787
Referral of construction industry grievance	3,044	321	517	551	831	824	2,473	227	421	516	577	732
Miscellaneous	798	124	160	204	148	162	722	126	132	179	142	143

Table 3

Labour Relations Officer Activity in Cases Processed*
Fiscal Year 1983-84

		Cases in Which Activity Completed					
			Settled				
Type of Case	**Total Cases Assigned**	**Total**	**Number**	**Percent**	**Referred to Board**	**Sine Die**	**Pending**
Total	**2,032**	**1,657**	**1,402**	**84.6**	**255**	**100**	**276**
Certification							
Interim certificate	49	32	26	81.3	6	2	16
Pre-hearing application	72	67	56	83.6	11	–	5
Other application	338	336	333	99.1	3	–	2
Contravention of Act	743	650	493	75.8	157	38	55
Construction industry grievance	763	524	460	87.8	64	59	180
Employee status	37	21	13	61.9	8	–	16
Occupational Health and Safety Act	30	27	21	77.8	6	1	2

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* Includes all cases assigned to labour relations officers, which may or may not have been disposed of by the end of the year.

Table 4

Labour Relations Officer Settlements in Cases Disposed of*
Fiscal Year 1983-84

Type of Case	Total Disposed of	Officer Settlements	
		Number	Percent of Dispositions
Total	**1,590**	**1,297**	**81.6**
Contravention of Act	787	592	75.2
Construction industry grievance	732	654	89.3
Employee status	43	29	67.4
Occupational Health and Safety Act	28	22	78.6

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* Includes only cases in which labour relations officers play the leading role in the processing of the case. The figures refer to cases disposed of during the year and should not be confused with data for the same types of cases in Table 3. Table 3 refers to new assignments of cases made to labour relations officers during the year which may or may not have been disposed of by the end of the year.

Table 5

Results of Representation Votes Conducted*
Fiscal Year 1983-84

Type of Case	Number of Votes	Eligible Employees	Ballots Cast	
			Total	In Favour of Unions
Total	**182**	**10,137**	**8,418**	**4,245**
Certification	138	9,155	7,531	4,049
Pre-hearing cases				
One union	35	3,160	2,680	1,301
Two unions	20	1,881	1,578	882
Three unions	1	328	292	172
Construction cases				
One union	6	77	69	36
Two unions	1	9	7	1
Regular cases				
One union	62	2,812	2,159	993
Two unions	12	772	649	589
Two unions with "No Union" Choice	1	116	97	75
Termination of Bargaining Rights	44	982	887	196

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* Refers to all representation votes conducted and the results counted during the fiscal year, regardless of whether or not the case was disposed of during the year.

Table 6

Results of Representation Votes in Cases Disposed of* Fiscal Year 1983-84

Type of Case	Number of Votes			Eligible Voters			All Ballots Cast			Ballots Cast in Favour of Unions		
					In Votes			In Votes			In Votes	
	Total	Won	Lost	Total	Won	Lost	Total	Won	Lost	Total	Won	Lost
Total	189	76	113	10,241	5,037	5,204	8,417	3,998	4,419	4,024	2,658	1,366
Certification	142	73	69	9,228	4,937	4,291	7,508	3,905	3,603	3,821	2,605	1,216
Pre-hearing cases												
One union	37	23	14	3,487	2,008	1,479	2,923	1,629	1,294	1,412	1,027	385
Two unions	22	16	6	1,983	1,096	887	1,671	937	734	935	675	260
Three unions	1	1	–	328	328	–	292	292	–	169	169	–
Construction cases												
One union	5	1	4	71	47	24	64	42	22	34	31	3
Two unions	4	2	2	102	40	62	50	23	27	26	17	9
Regular cases												
One union	63	21	42	2,786	961	1,825	2,116	600	1,516	961	405	556
Two unions	10	9	1	471	457	14	392	382	10	284	281	3
Termination of Bargaining Rights	47	3	44	1,013	100	913	909	93	816	203	53	150

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* Refers to final representation votes conducted in cases disposed of during the fiscal year. This table should not be confused with Table 5 which refers to all representation votes conducted during the year regardless of whether or not the case was disposed of during the year.

Table 7

Time Required to Process Applications and Complaints Disposed of, by Major Type of Case
Fiscal Year 1983-84

Time Taken (Calendar Days)	All Cases		Certification Cases		Section 89 Cases		Section 124 Cases		All Other Cases	
	Dispositions	Cumulative Percent	Dispositions	Cumulative Percent	Dispositions	Cumulative Percent	Dispositions	Cumulative Percent	Dispositions	Cumulative Percent
Total	**2,797**	-	**817**	-	**787**	-	**732**	-	**461**	-
Under 8 days	91	3.3	9	1.1	18	2.3	35	4.8	29	6.3
8-14 days	446	19.2	105	14.0	71	11.3	239	37.4	31	13.0
15-21 days	578	39.9	242	43.6	82	21.7	215	66.8	39	21.5
22-28 days	279	49.8	99	55.7	109	35.6	43	72.7	28	27.5
29-35 days	283	60.0	52	62.1	153	55.0	31	76.9	47	37.7
36-42 days	197	67.0	73	71.0	57	62.3	25	80.3	42	46.9
43-49 days	119	71.3	43	76.3	32	66.3	17	82.7	27	52.7
50-56 days	84	74.3	20	78.7	18	68.6	18	85.1	28	58.8
57-63 days	82	77.2	24	81.6	25	71.8	12	86.7	21	63.3
64-70 days	69	79.7	19	84.0	24	74.8	7	87.7	19	67.5
71-77 days	35	80.9	10	85.2	8	75.9	5	88.4	12	70.1
78-84 days	44	82.5	14	86.9	16	77.9	7	89.3	7	71.6
85-91 days	47	84.2	9	88.0	18	80.2	7	90.3	13	74.4
92-98 days	37	85.5	10	89.2	12	81.7	8	91.4	7	75.9
99-105 days	31	86.6	6	90.0	13	83.4	5	92.1	7	77.4
106-126 days	93	89.9	22	92.7	33	87.5	14	94.0	24	82.6
127-147 days	48	91.6	9	93.8	18	89.8	11	95.5	10	84.8
148-168 days	39	93.0	8	94.7	8	90.9	5	96.2	18	88.7
Over 168 days	195	100.0	43	100.0	72	100.0	28	100.0	52	100.0

Table 8

Union Distribution of Certification Applications Received and Disposed of Fiscal Year 1983-84

Union	Number of Applications Received	Number of Applications Disposed of			
		Total	Certified	Dismissed	Withdrawn
All Unions	**871**	**817**	**555**	**120**	**142**
CLC* Affiliates	**431**	**401**	**288**	**57**	**56**
Aluminium Brick and Glass Workers	–	1	1	–	–
Auto Workers	30	29	25	2	2
Bakery and Tobacco Workers	2	2	1	1	–
Broadcast Employees	1	1	1	–	–
Canadian Brewery Workers	15	15	11	2	2
Canadian Paperworkers	5	5	3	2	–
Canadian Public Employees (CUPE)	63	54	39	6	9
Clothing and Textile Workers	4	3	3	–	–
Communications & Electronics	3	4	3	1	–
Electrical Workers (UE)	7	9	5	4	–
Energy and Chemical Workers	15	16	12	4	–
Food and Commercial Workers	58	40	29	7	4
Glass, Pottery & Plastic Workers	–	1	1	–	–
Graphic Communications Union	10	9	9	–	–
Hotel Employees	23	26	14	5	7
Ladies Garment Workers	4	7	7	–	–
Leather & Plastic Workers	2	–	–	–	–
Machinists	4	3	2	1	–
Marine Officers	1	1	1	–	–
Merchant Guild Service	1	1	1	–	–
Molders	4	3	2	1	–
Newspaper Guild	2	2	2	–	–
Novelty Workers	4	4	3	–	1
Office and Professional Employees	1	1	1	–	–
Ontario Public Service Employees	13	17	16	1	–
Public Service Alliance	5	3	2	–	1
Railway, Transport and General Workers	2	2	–	2	–

Table 8 (Cont'd.)

Union Distribution of Certification Applications Received and Disposed of Fiscal Year 1983-84

Retail Wholesale Employees	34	31	22	2	7
Rubber Workers	1	1	1	–	–
Seafarers	2	2	1	1	–
Service Employees International	57	49	36	4	9
Theatrical Stage Employees	7	8	3	–	5
Typographical Union	5	6	3	1	2
United Garment Workers	2	2	1	–	1
United Paperworkers	3	3	1	–	2
United Steelworkers	35	33	20	9	4
United Textile Workers	–	1	1	–	–
Upholsterers	2	2	2	–	–
Utility Workers	2	2	2	–	–
Woodworkers	2	2	1	1	–

* Canadian Labour Congress

Table 8 (Cont'd.)

Union Distribution of Certification Applications Received and Disposed of Fiscal Year 1983-84

Union	Number of Applications Received	Number of Applications Disposed of			
		Total	Certified	Dismissed	Withdrawn
Non-CLC Affiliates	**440**	**416**	**267**	**63**	**86**
Aerospace Communications Employees	–	1	–	–	1
Allied Health Professionals	2	2	1	–	1
Boilermakers*	4	5	4	1	–
Bricklayers International*	14	14	10	2	2
Carpenters*	84	82	49	15	18
Canadian Operating Engineers	10	8	2	4	2
Christian Labour Association	9	6	4	1	1
Electrical Workers (IBEW)*	14	9	6	–	3
Food and Service Workers	2	2	1	1	–
Guards Association	1	1	1	–	–
Headwear Workers	3	3	3	–	–
Independent Local Union	28	29	19	4	6
International Operating Engineers*	49	46	28	9	9
Labourers*	94	89	52	10	27
National Council of Canadian Labour	1	1	1	–	–
Ontario Nurses Association	10	8	8	–	–
Ontario Secondary School Teachers	1	–	–	–	–
Painters*	11	11	9	–	2
Plant Guard Workers	3	3	2	–	1
Plasterers*	–	1	–	1	–
Plumbers*	14	10	5	3	2
Sheet Metal Workers*	20	19	15	2	2
Structural Iron Workers*	13	13	10	1	2
Teamsters	37	34	27	4	3
Textile Processors	16	19	10	5	4

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* These construction unions were reported as CLC (Canadian Labour Congress) affiliates in the 1981-82 report. In April 1982, following suspension by the Congress of its 12 building trades affiliates, the Asbestos Workers, Boilermakers, Bricklayers, Electrical Workers (IBEW), International Operating Engineers, Painters, Plasterers, Plumbers and Sheet Metal Workers joined with the Elevator Constructors to form the Canadian Federation of Labour. The Carpenters, Labourers, and Structural Iron Workers have not joined the Federation.

Table 9

Industry Distribution of Certification Applications Received and Disposed of Fiscal Year 1983-84

Industry	Number of Applications Received	Number of Applications Disposed of			
		Total	Certified	Dismissed	Withdrawn
All Industries	**871**	**817**	**555**	**120**	**142**
Manufacturing	**209**	**211**	**160**	**35**	**16**
Food, beverages	36	34	22	9	3
Tobacco products	–	–	–	–	–
Rubber, plastic products	9	7	5	2	–
Leather industries	2	2	2	–	–
Textile mill products	4	4	4	–	–
Knitting mills	–	–	–	–	–
Clothing industries	11	13	12	1	–
Wood products	14	14	11	2	1
Furniture, fixtures	7	7	6	1	–
Paper, allied products	9	9	5	2	2
Printing, publishing	15	15	11	1	3
Primary metal industries	6	8	7	1	–
Metal fabricating industries	31	30	23	4	3
Machinery, except electrical	5	4	2	2	–
Transportation equipment	17	16	15	–	1
Electrical products	7	9	6	3	–
Non-metallic mineral products	10	12	8	4	–
Petroleum, coal products	–	–	–	–	–
Chemical, chemical products	14	14	11	1	2
Miscellaneous manufacturing	12	13	10	2	1
Non-Manufacturing	**662**	**606**	**395**	**85**	**126**
Agriculture	–	–	–	–	–
Forestry	–	–	–	–	–
Mining, quarrying	7	6	5	–	1
Construction	254	248	153	37	58
Transportation	26	22	18	2	2
Storage	1	1	1	–	–
Communications	1	1	–	–	1
Electric, gas, water	8	5	4	–	1
Wholesale trade	22	23	14	4	5
Retail trade	35	36	26	3	7
Finance, insurance	4	2	2	–	–
Real Estate	23	18	9	6	3
Education, related services	25	19	12	5	2
Health, welfare services	109	105	79	9	17
Religious organizations	1	–	–	–	–
Recreational services	16	12	6	–	6
Business services	7	6	4	1	1
Personal services	12	10	8	1	1
Accommodation, food services	53	40	20	9	11
Miscellaneous service	38	36	24	4	8
Local government	20	16	10	4	2

Table 10

Size of Bargaining Units in Certification Applications Granted Fiscal Year 1983-84

Size of Bargaining Unit (Number of Employees)	Total		Construction		Non-Construction	
	Number of Applications	Number of Employees	Number of Applications	Number of Employees	Number of Applications	Number of Employees
Total, all sizes	**555**	**17,043**	**152**	**946**	**403**	**16,097**
2-9 employees	228	1,037	129	501	99	536
10-19 employees	104	1,417	18	246	86	1,171
20-39 employees	95	2,671	2	43	93	2,628
40-99 employees	90	5,071	3	156	87	4,915
100-199 employees	29	3,648	–	–	29	3,648
200-499 employees	7	1,727	–	–	7	1,727
500 employees or more	2	1,472	–	–	2	1,472

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* Refers to cases processed under the construction industry provisions of the Act. This figure should not be confused with the 153 certified construction industry applications shown in Table 9, which includes all applications involving construction employers whether processed under the construction industry provisions of the Act or not.

Table 11

Time Required to Process Certification Applications Granted*
Fiscal Year 1983-84

Calendar Days	Total Certified		Non-Construction		Construction	
	Number	Cumulative Per Cent	Number	Cumulative Per Cent	Number	Cumulative Per Cent
Total	**555**	–	**403**	–	**152**	–
Under 8 days	–	–	–	–	–	–
8-14 days	75	13.5	28	6.9	47	30.9
15-21 days	184	46.7	147	43.4	37	55.3
22-28 days	73	59.8	62	58.8	11	62.5
29-35 days	41	67.2	30	66.3	11	69.7
36-42 days	49	76.0	40	76.2	9	75.7
43-49 days	25	80.5	17	80.4	8	80.9
50-56 days	13	82.9	9	82.6	4	83.6
57-63 days	16	85.8	15	86.4	1	84.2
64-70 days	15	88.5	11	89.1	4	86.8
71-77 days	4	89.2	2	89.6	2	88.2
78-84 days	10	91.0	7	91.3	3	90.1
85-91 days	5	91.9	5	92.6	–	–
92-98 days	2	92.3	2	93.1	–	–
99-105 days	4	93.0	3	93.8	1	90.8
106-126 days	7	94.2	6	95.3	1	91.4
127-147 days	5	95.1	4	96.3	1	92.1
148-168 days	4	95.9	3	97.0	1	92.8
169 days and over	23	100.0	12	100.0	11	100.0

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* Refers only to applications in which certification was granted. This table should not be confused with Table 7 which refers to all certification applications disposed of during the year regardless of the method of disposition.